United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

77-7237

United States Court of Appeals

FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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PLAINTIFFS

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE
Pltffs.

vs.

Substitution 4/28/77
(9) CULLMAN, III, JOSEPH
(10) ENGELHARDT, JANE
(11) GLUCKSMAN, LEWIS L.
(12) ROBERT F. WAGNER, Commissioners of Port Authority of NY&NJ
(13) SCHULMAN, HOWARD, Commissioner Designate of the Port Authority of NY&NJ

DEFENDANTS Pollack, J.

(1) THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and
(2) ROMAN, WILLIAM J.
(3) ~~STILLMAN, W. PAUL~~
(4) ~~HELMUTH, JAMES F.~~
(5) ~~YANTTELLI, VICTOR R.~~
~~ANTELL, ANDREW G.~~
~~HERLINGER, GEORGE E.~~
(6) GILBERT, MILTON A.
~~DOUGLASS, ROBERT R.~~
(7) KELLOGG, III, JAMES G.
~~LEWIS, GUSTAVE E.~~
~~WEBER, MATTHEW~~
(8) SAGNER, ALAN, Commissioners of the Port Authority of NY & NJ

DOCKET ENTRIES

CAUSE

Action seeks declaratory and injunctive relief to declare null and void and to enjoin any actions or inactions by defts. that are intended to or for the effect of preventing, delaying or impeding the operations by pltffs. of the Concorde aircraft at J.F.K. International Airport in N.Y., etc. rg

ATTORNEYS

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03-11-77 JOHN A. WELLS, Esq.
STANLEY GODOFSKY, ESQ.
STEPHEN FROLING, ESQ. OF COUNSEL

Patrick J. Falvey
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CHECK HERE IF CASE WAS FILED IN FORMA	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	MAR 17 1976	7/16/76 73109		JS-5	

0-1276 Judge Pollack British Airways Board, et ano, -vs- Port Authority of N.Y. & N.J. et al.

DATE	NR.	PROCEEDINGS
03-17-76	1	Filed complaint and issued summons.
03-17-76	2	Filed Pltff Compagnie Nationale Air France Affdvt&Order appointing individuals to Serve Summons&Complaint by Roy W.McBride,Thomas J.Bens,Timothy R.Cappel or any of them who is citizen of U.S.&over 18 yrs of age in place&stead of U.S.Marshal.Clk.
03-18-76	3	Filed Summons with Affdvt of Service by Thomas J.Bens of 15 true copies personally to Francis X.Curley ,atty for defts on 3/17/76. PJF
04-06-76	4	Filed ANSWER of Defts.
5/7/76		Pre trial before Pollack, J. - Affdvt
06-02-76	5	Filed Pltffs/British Airways Board/opposes motion of Town of Hempstead to intervene in this action against Port Authority of NY&NJ.
06-04-76	6	Filed Pltff Air France in opposition to motions to intervene.
07-06-76	7	Filed Town of Hempstead,Incorp. Village of Lawrence, Incorp. Village of Cedarhurst, Incorp. Village of Atlantic Beach, Robert F. Check, Mona Gottesman and Herbert Warshavsky motion to intervene as defts,etc.
07-06-76		Filed memoend, on paper # 7 ...Several municipalities, organizations,and private individuals have moved to intervene in this action pur 24(a)(b). For the reasons which appear hereafter, the motions are denied. Leave to renew the motions will be granted, however, on good cause shown...Pollack,J. mm
07-06-76	8	Filed Friends of the Earth, et al.'s notice of motion re: intervention.
07-06-76		Filed memo-end, on paper # 8...Motion denied. See memo of this date on appl. of Town of Hempstead, et al. Pollack,J. mm
07-12-76	9	Filed Pltff's Affdvt&Notice of Motion for summary judgment rat.9/13/76,2:00 P.M.
07-12-76	10	Filed " Memorandum in support of motion for " "
07-12-76	11	Filed Exhibits to Affdvt of John A.Wells for pltff's motion for summary judgment
07-12-76	12	Filed Applicants'Reply to pltffs'opposition to intervention.
07-12-76	13	Filed Memorandum supporting application for intervention .
07-16-76	14	Filed Applicants for Intervention Notice of Appeal from Order denying motion of sai " " " to intervene as matter of right,or in alternative to intervene permissively pursuant to provisions of Rule 24(a)(a)&Rule 24(b)(2) FRCP entered 7/6/76.(mailed copies to William C.Clarke,Rogers&Wells&Patrick J.Falvey,Esqs. on 7/16/76)
07-22-76	15	Filed Pltffs'Memorandum in opposition to applicants'motion for a stay.
07-22-76	16	Filed Notice that original record was certified and transmitted to USCA,2nd Circuit.
07-23-76	17	Filed Memorandum in support of applicants'motion for a stay.
07-23-76	18	Filed MEMORANDUM.Motion for stay of proceedings is denied.So Ordered.Pollack,J(mm)
9-16-76		Filed letter dated 9-15-76 from P.Talvey General Counsel P.Authority of NY & NJ to Judge Pollack re: reply to motion to dismiss
07-26-76	19	Filed Notice that suppl record has been certified and transmitted to USCA.
08-17-76	20	Filed Affdvt of Ada Swain of affdvt of Service of true copy of Brief Amicus Curiae of State of California in support of Port Authority of NY and NJ;Application for leave to file Brief Amicus Curiae by State of California on behalf of Port Authority of NY&NJ and in opposition to pltffs'motion for Summary Judgment;Order upon Wm.Clarke,Esq.Covington&Burling;Patrick J.Falvey,Esq.Rogers&Wells;William D.Denson,Esq.&Nickerson Kramer,Lowenstein,Nesson,Camin&Soll,Esqs on 8/14/76. Brief Amicus Curiae of State of California in support of Port Authority of NY&NJ Application for leave to file Brief Amicus Curiae by State of Calif on behalf of Port Authority of NY&NJ&in opposition to pltffs'motion for summary judgment. Order.(Mailed bak one endorsed copy to office in enclosed self-addressed stamped envelope,to Nicholas C.Yost,Deputy Atty General in Charge,Environmental Unit.
08-17-76	21	Filed Defts'Memorandum in opposition to pltffs'motion for summary judgment.
08-17-76	22	Filed Appendix to Deft's Memorandum in opposition to pltffs'motion for summary judgment.
08-31-76	23	Filed Reply Memorandum for pltffs .
9/3/76		Pre trial before Pollack J.
11-17-76	24	Filed true copy of USCA that order is affirmed with costs to be taxed against appellant.JUDGMENT ENTERED.Clk (mm) Ent.11/18/7

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 76 Civ.
BRITISH AIRWAYS BOARD ET ANO	THE PORT AUTHORITY OF NY&NJ ET AL	PAGE 3 OF ___ PAG

DATE	NR.	PROCEEDINGS
12-20-76	25	Fld Pltffs Compagnie Nationale Air France affdvt&Notice of motion re: renew its motion in Rm.1306 for summary judgment ret.1/17/77,10:00 A.M.
12-20-76	26	Fld Pltffs' Memorandum in support of motion for summary judgment.
12-28-76	27	Filed motion of theGovts. of the United Kingdom and France to file joint statement.
02-01-77	28	Filed Reply Memorandum of Pltffs British Airways and Air France.
2-16-77		Pretrial before Pollack, J.
3/30/77		Pretrial before Pollack, J.
4-11-77		Pretrial before Pollack, J.
04-27-77	28 a	Filed Memorandum of Amici Curiae,Friends of Earth.
04-27-77	29	Filed Brief of Amici Curiae ,Town of Hempstead.
04-27-77	30	Filed Defts'suppl.Memo in opposition to pltffs'motion for summary judgment.
04-27-77	31	Filed Pltff's letter of 4/22/77 with statement of Port Authority's resolution of 4/14/77.
04-27-77	32	Filed pltff's letter of 4/26/77 with statement of law suits.
04-28-77		Hearing begun before Pollack, J. concluded on motion for summary judgment.Decision reserved.
04-28-77	33	Filed Stip.&Order that names indicated are substituted as defts in action in place of their predecessors in office.Pollack,J.
05-09-77	34	Filed Post-Argument Memo of Port Authority defts.
05-09-77	35	Filed Appendix to post-argument Memo of Port Authority Defts.
05-10-77	36	Filed Suppl.Memo of Amici Curiae in opposition to pltffs'motion for summary judgment.
05-10-77	37	Filed Amici Curiae,Town of Hempstead,et al Continuation of Argument.of
05-10-77	38	Filed Pltff Compagnie Nationale Air France Documents.
05-11-77	39	Filed OPINION# 45899. SUBMIT JUDGMENT IN ACCORDANCE WITH DECISION WITHIN 10 days hereof,after counsel have conferred on form of proposed judgment. POLLAck ,J.
05-12-77	40	Filed Book-titled"DEPARTMENT OF TRANSPORTATION, UNITED STATES OF AMERICA-AVIATION NOISE ABATEMENT POLICY-OFFICE OF THE SECRETARY-FEDERAL AVIATION ADMINISTRATION.
05-12-77	41	Filed Letter dated 5/6/77 HAND DELIVERY to Hon.Milton Pollack ,with attachment of enclosed opinion of Calif.District Court of Appeal ,4th District in San Diego,136 Cal.Reptr 557(Feb.18,1977) etc.signed Rogers&Wells ,By.John A.Wells and William C.Clarke,Esq.Attys for pltffs.cc:Patrick J.Falvey,Esq. (By Hand)
05-22-77	42	Filed OPINION # 45899. ERRATA.Appearances contd(see front of docket sheet)
05-25-77	43	Filed transcript record of proceedings, dated 4-28-77
05-20-77		BEFORE POLLACK,J. -Hearing held and concluded.
05-20-77	44	Filed JUDGMENT -Ordered that pltff.s' motion for summary judgment is granted ...defts. are enjoined from interfering with or impeding the operation by pltffs. of Concorde aircraft,etc. and that the effectiveness of this order, judgment and decree is stayed until 4PM 5-24-77 on condition that defts. shall promptly file notice of appeal from this order and judgment and proceed with expedition thereunder. Pollack,J. m/n JUDGMENT ENTERED 5-20-77 Clerk
05-20-77	45	Filed Pltff's Memo in opposition to motion for stay pending appeal.
05-20-77	46	Filed Unsigned Pltff's Counter Proposed Judgment.
05-20-77	47	Filed Affdvt of Alfred de Cabrol of pltff Compagnie Nationale Air France in opposition to defts'application for a stay.
05-20-77	48	Filed Port Authority Defts. Memo in support of motion to stay enforcement of judgment.

(contd on.4)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 76-1276
BRITISH AIRWAY BOARD ET ANO	PORT AUTHORITY OF NY&NJ ET AL	PAGE 4 OF 4 PAGES

DATE	NR.	PROCEEDINGS
05-20-77	49	Filed Defts.-Port Authority Notice of Appeal from judgment declaring invalid the Port Authority's temporary ban on Concorde operations at John F.Kennedy International Airport and enjoining enforcement of such ban,entered in this actionn on May 20,1977.(mailed notice to Wm.C.Clarke,Esq.245 Park Ave.NY,NY10017; Rogers&Wells,Esqs.,200 Park Avenue,NY,NY10017)
05-20-77	50	Filed Applicants for intervention ,Town of Hempstead et al motion to intervene affdvts and motion under Rule 59 FRCP.
05-20-77	-	Filed Memo end.on document #50. Motion denied.So Ordered.Pollack,J. m/n
05-23-77	51	Filed Applicants Memorandum for intervention in support of motions(a)to intervene Rule 24(a)and (b)Rule 59 FRCP.
05-23-77	52	Filed Applicants for intervention -Town of Hempstead,Incorporated Villages of Lawrence,Cedarhurst and Atlantic Beach,Robert F.Cheek,Mona Gottesman&Herbert Warmansky Joint Notice of Appeal 2nd Circuit from Order of Judge Pollack denying motion of said applicants for intervention to intervene as matter or right pursuant to prov.of Rule 24(a)(2)FRCP entered on 5/20/77. (mailed notice to William C. Clarke,Rogers Wells&Patrick J.Falvey on 5/23/7
05-23-77	53	Filed Notice of Appeal and certifd trans. to U.S.C.A. 2nd Circuit
05-24-77	54	" " " " " " "
		list suppl rcd

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By [signature]
Deputy Clerk

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-44)
(Formerly D. C. Form No. 45 Rev. (6-49))

United States District Court

FOR THE

Judge Pollack

SOUTHERN DISTRICT OF NEW YORK

76 Civ 1276

CIVIL ACTION FILE NO. _____

BRITISH AIRWAYS BOARD

and

COMPAGNIE NATIONALE
AIR FRANCE,

Plaintiffs,

v.

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY and
WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G.
HELLMUTH, VICTOR R. YANITELLI, ANDREW C.
AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT,
ROBERT R. DOUGLASS, JAMES C. KELLOGG, III,
GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon

William C. Clarke, attorney for British Airways Board and Rogers & Wells, attorneys for Compagnie Nationale Air France

~~plaintiff's attorney~~, whose addresses are:

British Airways
245 Park Avenue
New York, New York 10017
983-3113

200 Park Avenue
New York, New York 10017
972-7000

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT, Clerk

Clerk of Court.

G Harrison

Deputy Clerk.

Date: March 17, 1976

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 ,

I received this summons and served it together with the complaint herein as follows:

MARSHAL'S FEES

Travel ---- $ ----------

Service ---- ----------

United States Marshal.

By ----------

Deputy United States Marshal.

Subscribed and sworn to before me, a this

day of , 19 .

[SEAL]

Note:—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

No. ----------

United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD
and
COMPAGNIE NATIONALE
AIR FRANCE, Plaintiffs,

v.

THE PORT AUTHORITY OF NEW
YORK AND NEW JERSEY, et al., Defendants.

SUMMONS IN CIVIL ACTION

Returnable not later than 20 days

after service.

William C. Clarke, attorney for British Airways Board

Rogers & Wells, *Attorney for Plaintiff*
Compagnie Nationale Air France

170-81—6-27-74-3000-2867

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

BRITISH AIRWAYS BOARD	:	
and	:	
COMPAGNIE NATIONALE AIR FRANCE	:	
	:	
Plaintiffs,	:	
v.	:	Civil Action No.
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY	:	
	:	
and	:	
WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLASS, JAMES C. KELLOGG, III, GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER,	:	
Commissioners of the Port Authority of New York and New Jersey,	:	
	:	
Defendants.	:	

- - - - - - - - - - - - - - - - - - X

COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

1. This is a suit for declaratory and injunctive relief to declare unlawful and to enjoin any actions or inactions by defendants that are intended to or have the effect of preventing, delaying or impeding the operation by plaintiffs British

Airways Board ("British Airways") and Compagnie Nationale Air France ("Air France") of the Concorde aircraft at John F. Kennedy International Airport ("JFK") in New York on the ground that such actions or inactions are in violation of the United States Constitution, United States statutes and the international obligations of the United States arising under treaty or otherwise. The bases for plaintiffs' claims are that:

(a) Such actions or inactions by defendants invade a field of regulation that has been preempted by a comprehensive scheme of federal regulation and by an express federal decision authorizing British Airways and Air France to conduct limited operations of the Concorde into and out of JFK, and are, therefore, invalid under the Supremacy Clause, Article VI, Section 2, of the United States Constitution.

(b) Such actions or inactions by defendants invade federal sovereignty over the navigable air space of the United States and are, therefore, invalid under the Supremacy Clause.

(c) Such actions or inactions by defendants are inconsistent and in conflict with valid and binding treaties, international agreements and obligations of the United States, and are, therefore, invalid under the Supremacy Clause.

(d) Such actions or inactions by defendants have a substantial adverse effect on the foreign relations of the United States and are inconsistent with an express decision by the federal government authorizing British Airways and Air France to operate the Concorde

aircraft into and out of JFK, a decision made in the light of express federal recognition of the effect of its decision on the conduct of United States foreign relations. Such actions or inactions, therefore, are invalid as an unconstitutional interference with the exclusive authority of the federal government to conduct foreign relations.

(e) Such actions or inactions by defendants burden interstate and foreign commerce; and invade an area that requires uniformity of regulation by the federal government. Such actions or inactions, therefore, are invalid under the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution.

Jurisdiction and Venue

2. The plaintiffs' claims arise under the Constitution, certain laws including acts of Congress regulating commerce, and treaties and international agreements of the United States. Plaintiff British Airways is a citizen of the United Kingdom and Air France is a citizen of France. The defendants are citizens of the states of New York and New Jersey. The matter in controversy exceeds the sum of $10,000, exclusive of interest and costs. The jurisdiction of this Court is therefore invoked pursuant to 28 U.S.C. §§1331(a) (federal question), 1332(a) (diversity of citizenship), 1337 (commerce clause) and 2201-202 (declaratory judgment). The venue of this proceeding is in this Court pursuant to 28 U.S.C. §1391(b).

3. There exists between the parties an actual controversy, justiciable in nature and within the jurisdiction

of this Court, in respect of which this Court can render an adequate and effective judgment that will advance the interests of justice.

Parties

4. (a) Plaintiff British Airways is a public corporation of the United Kingdom of Great Britain and Northern Ireland, and is a foreign air carrier engaged in foreign air transportation within the meaning of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq. British Airways is a designated air carrier of the United Kingdom pursuant to the Air Services Agreement between the United States of America and the United Kingdom, done at Bermuda, February 11, 1946, as amended (60 Stat. 1499, T.I.A.S. 1507) (the "Bermuda Agreement"), for the purpose of operating air services on certain routes named therein, including, inter alia, the route between London and New York. British Airways is the holder of a foreign air carrier permit issued by the Civil Aeronautics Board ("CAB") pursuant to section 402 of the Federal Aviation Act (49 U.S.C. §1372) and approved by the President of the United States, authorizing it, inter alia, to engage in foreign air transportation of persons, property and mail between London and New York. (CAB Order 74-4-17, approved by the President, April 2, 1974.) British Airways is also the holder of operations specifications issued by the Federal Aviation Administration ("FAA") pursuant to FAR 129 (14 C.F.R. §129) which specify that it may conduct operations at New York through JFK, and which, pursuant to the Decision and Order of the Secretary of Transportation, February 4, 1976, are being amended to

specify that it may conduct operations at JFK with Concorde aircraft subject to certain conditions and limitations.

(b) Plaintiff Air France is a public company of the Republic of France ("France") and is a foreign air carrier engaged in foreign air transportation within the meaning of the Federal Aviation Act. Air France is a designated air carrier of France pursuant to the Air Transport Services Agreement between the United States of America and France, done at Paris, March 27, 1946, as amended (61 Stat. 3445, T.I.A.S. 1679) (the "Paris Agreement"), for the purpose of operating air services on certain routes named therein, including, inter alia, the route between Paris and New York. Air France is the holder of a foreign air carrier permit issued by the CAB pursuant to section 402 of the Federal Aviation Act and approved by the President of the United States, authorizing it, inter alia, to engage in foreign air transportation of persons, property and mail between Paris and New York. (CAB Order 69-12-58, approved by the President, December 11, 1969.) Air France is also the holder of operations specifications issued by the FAA pursuant to FAR 129 which specify that it may conduct operations at New York through JFK, and which, pursuant to the Decision and Order of the Secretary of Transportation, February 4, 1976, are being amended to specify that it may conduct operations at JFK with Concorde aircraft subject to certain conditions and limitations.

5. Defendant The Port Authority of New York and New Jersey ("the Authority") is a body corporate and politic created

as a joint agency of the States of New York and New Jersey by a compact (supplementing and amending an existing agreement of 1834 between the two States), entered into by the two States in April, 1921 and approved by joint resolution of Congress on August 23, 1921. The Authority consists of twelve Commissioners, six appointed by the Governor of New York and six appointed by the Governor of New Jersey, constituting a board and having a Chairman and Vice-Chairman elected from their number. Each of the defendant Commissioners is a citizen of either the State of New York or the State of New Jersey. The Authority maintains and operates JFK under lease from the City of New York and has its executive office at One World Trade Center, New York, New York 10048, where each of the Commissioners performs official functions on behalf of the Authority.

Facts Giving Rise To The Controversy

6. On February 4, 1976, William T. Coleman, Jr., United States Secretary of Transportation ("the Secretary"), rendered a Decision and Order authorizing plaintiffs to conduct limited scheduled commercial operations of the Concorde aircraft to and from the United States for a trial period not to exceed 16 months. Specifically, the Secretary ordered action that would permit, subject to the terms and conditions set forth in the Decision and Order, two Concorde flights a day by each plaintiff into and out of JFK and one Concorde flight a day by each plaintiff into and out of Dulles International Airport ("Dulles") in Virginia, serving Washington, D.C. A copy of said Decision and Order will be filed with the Court contemporaneously with the filing of this Complaint.

7. In rendering his Decision and Order, the Secretary acted in response to formal applications by plaintiffs

for amendment of their "operations specifications" to specify the Concorde aircraft as a type of aircraft to be flown at JFK and Dulles, pursuant to the Federal Aviation Act.

8. By letter dated March 11, 1976, plaintiffs notified the Authority of their intention to schedule commercial flights at JFK beginning on or about April 10, 1976. A copy of said letter is annexed hereto as Exhibit A.

9. On March 11, 1976, the Authority denied permission to plaintiffs to operate the Concorde into or out of JFK, asserting, as grounds for its decision, a desire to make an independent evaluation of noise data and community reaction relative to the Concorde, based upon operating experience at Dulles Airport, Heathrow Airport in London, and Charles de Gaulle Airport in Paris. A copy of the resolution denying permission for supersonic transport operations at JFK, together with a letter of transmittal thereof, is annexed hereto as Exhibit B.

COUNT I

PREEMPTION

A. Generally

10. Plaintiffs incorporate by reference paragraphs 4 through 9 of this Complaint.

11. Secretary Coleman's Decision and Order is in implementation of a broad and comprehensive regulatory scheme to control and regulate the use of the navigable airspace and aircraft operations in the United States. Congressional action authorizing and directing such regulation is contained in the Federal Aviation Act; the Department of Transportation Act of 1966 (the "DOT Act"), 49 U.S.C. § 1651 et seq.; and the Noise Control Act of 1972, Public Law 92-574, 86 Stat. 1234.

(a) Congress has stated that "[t]he United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . ," Federal Aviation Act §1108(a), 49 U.S.C. § 1508(a), and "navigable airspace" is defined to include all airspace "above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." Id. § 101(24), 49 U.S.C. § 1301(24).

(b) Congress established the FAA, within the Department of Transportation, DOT Act § 3(e)(1), 49 U.S.C. § 1652(e)(1), and conferred upon the FAA the broad powers and responsibilities relating to aviation safety that are set forth in the Federal Aviation Act.

(c) Certain responsibilities under the Federal Aviation Act relating to environmental policy, overall aviation policy and international relations are vested in the Secretary of Transportation. The Secretary has the responsibility under Section 305 of the Federal Aviation Act, 49 U.S.C. § 1346, "to encourage and foster the development of civil aeronautics and air commerce in the United States and abroad" and the responsibility under Section 1102 of the Federal Aviation Act, 49 U.S.C. § 1502, to respect "any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country. . . ." In addition, the DOT Act charges the Secretary with "the development of national

transportation policies and programs conducive to the provision of fast, safe, efficient and convenient transportation. . . ." DOT Act § 2(a), 49 U.S.C. § 1651(a). The Secretary is also instructed to "stimulate technological advances in transportation. . . ." Id. § 2(b)(1), 49 U.S.C. § 1651(b)(1).

(d) Congress has granted to the CAB extensive responsibilities in areas affecting the use of the navigable airspace and aircraft and, in particular, the operations of aircraft in common carrier commercial service in the United States and between the United States and foreign countries.

B. Federal Regulation of Foreign Air Carrier Operations

12. The operations of a foreign air carrier within the navigable airspace of the United States are subject to a broad and comprehensive federal scheme of regulation and licensing.

(a) Congress has provided that no foreign air carrier may engage in foreign air transportation, which is commercial common carriage of persons or property or the carriage of mail between the United States and a foreign country, unless there is in force a permit issued by the CAB and approved by the President of the United States. Federal Aviation Act §§ 402(a), 801, 49 U.S.C. §§ 1372(a), 1461. Foreign air carrier permits are issued after notice and opportunity for hearing upon findings by the CAB that the transportation proposed will be in the public interest and that the carrier is fit, willing and able to perform the

transportation and to conform to the Federal Aviation Act and rules and regulations of the CAB thereunder. Id. § 402(b), 49 U.S.C. § 1372(b). Any permit is subject to the prescription by the CAB of reasonable terms, conditions and limitations in the public interest. Id. § 402(e), 49 U.S.C. § 1372(e).

(b) Pursuant to the statutory authority previously noted, the FAA Administrator has also promulgated detailed regulations controlling the operations of foreign air carriers holding permits issued by the CAB. These regulations are generally contained in Part 129 of the FAA regulations, FAR 129, 14 C.F.R. § 129.1 et seq.

(i) The FAR 129 regulations provide that a foreign air carrier must "conduct its operations within the United States in accordance with operations specifications issued by the Administrator, including --

> "(1) Airports to be used;
>
> "(2) Routes or airways to be flown; and
>
> "(3) Such operations, rules and practices as are necessary to prevent collisions between foreign aircraft and other aircraft." 14 C.F.R. § 129.11(a).

(ii) A foreign air carrier may operate an aircraft in the United States on the condition that "that aircraft carries current registration and airworthiness certificates issued or validated by the country of registry and displays the nationality and registration markings of that country." 14 C.F.R. § 129.13(a). The application

forms for operations specifications prescribed by FAR 129 includes the type of aircraft to be flown. 14 C.F.R. § 129, App. A.

C. Federal Regulation of Aircraft Noise

13. The Federal government has also developed a broad and comprehensive scheme to control and regulate aircraft noise levels. Congress, in enacting the Noise Control Act of 1972, which amended Section 611 of the Federal Aviation Act, 49 U.S.C. § 1431, has expressly directed the FAA Administrator, "[i]n order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom . . . ," 49 U.S.C. § 1431(b)(1), to consult with the Secretary of Transportation and the Administrator of the Environmental Protection Agency ("EPA") and thereafter to "prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom . . . ." 49 U.S.C. § 1431(b)(1), consistent with the considerations set forth in 49 U.S.C. § 1431(d), including "whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine . . . to which it will apply. . . ." Pursuant to this direction, the FAA Administrator has pursued a broad federal regulatory program to control and abate aircraft noise. Specific federal actions respecting supersonic aircraft noise standards have been taken pursuant to the noted statutory authorizations and directions, including a rule making proceeding that has not yet been completed.

D. Express Federal Action Authorizing Concorde to Operate at JFK

14. Plaintiffs British Airways and Air France have been designated by Her Majesty's Government and the Republic of France, respectively, pursuant to pertinent provisions of the Bermuda and Paris Agreements, as the national carriers to operate certain routes provided for in such agreements that name New York as a destination point in the United States. Pursuant to provisions of the Bermuda and Paris Agreements, British Airways and Air France have qualified before the aeronautical authorities of the United States, and have received from the CAB under Section 402 of the Federal Aviation Act, foreign air carrier permits authorizing them to engage in foreign air transportation between points in the United Kingdom and France, respectively, on the one hand, and points in the United States, including New York, on the other. The issuance of such permits and amendments thereto have been approved by the President pursuant to Section 801 of the Federal Aviation Act. Such permits contain no terms, conditions or limitations affecting the type of aircraft that may be flown by British Airways and Air France in performing the authorized air transportation. Under such permits, British Airways and Air France for many years have served New York through JFK.

15. Certificates of airworthiness that satisfy the Bermuda and Paris Agreements and the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591 (the "Chicago Convention"), have been issued by the civil aviation authorities of the United Kingdom and France for Concorde Aircraft. Since January 21, 1976, Concorde has

been in the commercial service of British Airways and Air France.

16. On February 4, 1976 pursuant to and in implementation of the broad scheme of federal regulation outlined in paragraphs 11 to 13 of this Complaint, supra, and in specific response to applications filed by the plaintiffs seeking amendment of their operations specifications to name Concorde as a type of aircraft to be flown at JFK and Dulles, Secretary Coleman ordered a 16 month demonstration period, during which each plaintiff is permitted to conduct up to two Concorde flights per day into and out of JFK and one Concorde flight per day into and out of Dulles, under certain specified terms and conditions. The Secretary's Decision and Order expressly directed the FAA Administrator to amend plaintiffs' operations specifications to permit plaintiffs to operate the Concorde aircraft at JFK and Dulles.

17. The Decision and Order of the Secretary was the culmination of an extensive process through which information was developed and views presented on all relevant factors relating to the proposed Concorde operations, including noise, air quality, climate, the stratosphere, safety and other matters. Such information forming a basis for the Secretary's decision included:

(a) A draft environmental impact statement analyzing the likely environmental impact of the proposed operations at JFK and Dulles prepared by the FAA pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4331 et seq., and released on March 3, 1975. This draft statement was sent to, among others, numerous New York and New Jersey officials,

individuals and organizations, including the Governors of New York and New Jersey and the defendant Authority.

(b) A final environmental impact statement prepared after:

(i) public hearings on the draft environmental impact statement held in Washington, D.C., on April 14 and 15, 1975, in New York City on April 18, 19 and 24, 1975, and in Sterling Park, Virginia, on April 21, 1975, including presentations by approximately 130 witnesses; and

(ii) the receipt of over 2900 written comments on the draft statement.

(c) A public hearing personally conducted by the Secretary on January 5, 1976, at which over 60 witnesses presented over seven hours of testimony.

(d) The receipt of over 50 additional written submissions or testimony provided in connection with the January 5, 1976, hearing, including data reporting vibration measurements taken from actual Concorde operations near Heathrow and Charles de Gaulle Airports.

(e) The development of an addendum to the final environmental impact statement, which together with the final statement and the Secretary's Decision and Order were filed with the Council on Environmental Quality on February 4, 1976.

18. The noise, air quality, safety and other issues specifically affecting Concorde operations at JFK were expressly considered in the Secretary's Decision and Order and the final environmental impact statement and its addendum.

(a) The likely noise impact of Concorde operations specifications at JFK was considered in the Secretary's Decision and Order at pages 4, 42-50, and 58; in the final environmental impact statement at pages VI-97-100, VI-148-57, VI-184, X-35; and at pages 7 and 17 of the addendum. The Secretary concluded that the operation of the Concorde at JFK would increase the noise level "relatively little compared to the existing levels of noise exposure." (Decision and Order at 47.) The Secretary also concluded that vibration does not present any danger of structural damage and little possibility of annoyance. (Id. at 43.)

(b) The possible increases in air pollution from Concorde operations at JFK were specifically considered in the Secretary's Decision and Order at page 28; in the final environmental impact statement at pages VI-33-38, VI-103-06, VI-157-69, X-50; and at page 21 of the addendum. The Secretary concluded that the air quality impact at JFK would be minimal. (Decision and Order at 28.)

(c) The safety aspects of Concorde operations at JFK were considered in the Secretary's Decision and Order at pages I-4-5; and in the final environmental impact statement at pages IV-17-21, X-7, X-11, X-16 and in Appendix F. Among other things, the Secretary reviewed and concurred in the conclusions of the FAA Administrator (Decision and Order at II-6, II-15-22) that the Concorde can be operated safely in the air traffic control system, that the noise

abatement maneuver by Concorde off runway 31 Left at JFK is "quite safe," and that the FAA is "confident that the aircraft meets all relevant safety standards for supersonic aircraft flying today." (Decision and Order at I-4-5.)

19. Through federal statutes and regulations, the federal government has preempted the field of regulating the navigable air space and aircraft operations, and specifically regulation of the type of aircraft that may be permitted to land at international airports in the United States by foreign air carriers and regulation based on safety and noise considerations. Secretary Coleman's Decision and Order of February 4, 1976 is in direct implementation of the federal scheme of regulation described hereinabove. Any actions or inactions by defendants having the effect of preventing, delaying or impeding Concorde operations by plaintiffs are, therefore, invalid under the Supremacy Clause, Article VI, Section 2, of the United States Constitution.

20. The regulation of foreign air carriers and the specific regulation of the type of aircraft that a foreign air carrier may utilize in scheduled commercial flights to a United States international airport relate to an area in which federal interests are so dominant and the need for exclusive federal supervision and national uniformity so compelling that any actions or inactions by defendants having the effect of preventing, delaying or impeding Concorde operations by plaintiffs at JFK are invalid under the Supremacy Clause.

21. The federal government, through the Secretary of Transportation, has expressly decided to authorize the Concorde aircraft to operate into and out of JFK. Any actions or inactions by defendants that have the effect of preventing, delaying

or impeding the authorized Concorde operations are in direct conflict with federal action and are, therefore, invalid under the Supremacy Clause.

COUNT II

VIOLATIONS OF PLAINTIFFS' TREATY RIGHTS

22. Plaintiffs incorporate by reference paragraphs 4 through 21 of this Complaint.

23. The United Kingdom and the Republic of France are parties to aviation agreements with the United States. Three such agreements are pertinent here: the Bermuda Agreement between the United States and the United Kingdom, the Paris Agreement between the United States and France, and the Chicago Convention, to which the United Kingdom, France and the United States are signatories.

24. The Bermuda Agreement creates obligations of the United States respecting the operation of air carriers such as British Airways that are designated by the United Kingdom. The Bermuda Agreement requires that British Airways be permitted to use JFK for international passenger, cargo and mail traffic and does not recognize limitations imposed by laws or regulations enacted or promulgated by the individual states, other political subdivisions or airport operators.

25. The Paris Agreement creates obligations of the United States respecting the operation of the air carriers such as Air France that are designated by France. The Paris Agreement requires that Air France be permitted to use JFK for international passenger, cargo and mail traffic and does not recognize limitations imposed by laws or regulations enacted

or promulgated by the individual states, other political subdivisions or airport operators.

26. The Chicago Convention requires that every airport of a contracting state which is open to public use by its national aircraft shall likewise be open under uniform conditions to the aircraft of all of the other contracting states, and that certificates of airworthiness issued by the contracting state in which the aircraft is registered shall be recognized as valid by other contracting states. JFK is an airport open to public use by United States aircraft. The Concorde has been duly certified by the competent authorities of the United Kingdom and France as airworthy. The Chicago Convention thus creates an international obligation, binding on the United States, to permit operations of the Concorde into and out of JFK by British Airways and Air France. The Chicago Convention does not recognize limitations on these rights imposed by laws or regulations enacted or promulgated by individual states, other political subdivisions or airport operators.

27. The international obligations of the United States reflected in the Bermuda and Paris Agreements and the Chicago Convention are also binding on the individual states and their agencies, including the defendant Authority, under the Supremacy Clause of the United States Constitution, Article VI, Clause 8.

28. Any actions or inactions by defendants that have the effect of preventing, delaying or impeding Concorde operations by British Airways or Air France at JFK are inconsistent with treaties, international agreements and obligations of the

United States and are, therefore, invalid under the Supremacy Clause of the Constitution.

COUNT III

VIOLATION OF THE FEDERAL GOVERNMENT'S EXCLUSIVE AUTHORITY TO CONDUCT FOREIGN RELATIONS

29. Plaintiffs incorporate by reference paragraphs 4 through 28 of this Complaint.

30. The treatment afforded foreign air carriers by the defendants has a direct impact on the conduct of foreign relations by the United States. Frequently, as is the case with British Airways and Air France, foreign air carriers are operated by the governments of their respective countries. Discriminatory or unfair treatment of foreign air carriers in the United States would upset the balance of benefits flowing between the United Kingdom and France, on the one hand, and the United States, on the other.

31. The Concorde program in particular is of major significance to the governments and peoples of the United Kingdom and France. The joint Anglo-French development and manufacturing effort began formally in 1962, and since then has involved an enormous commitment of money, manpower, national resources and pride by both governments. Some $3 billion has thus far been expended on the program.

32. The national importance attached by the British and French to their planned Concorde operations to the United States was specifically recognized by Secretary of State Kissinger in his letter of October 9, 1975 to Secretary Coleman concerning the foreign policy implications of Secretary Coleman's decision on the applications of Air France and British Airways to fly the Concorde to JFK and Dulles:

"In terms of our political relations, we realize that this project, in which both governments have invested very large sums, represents a unique achievement by both Britain and France in a high technology aircraft that commands close attention at the highest levels in both countries, as well as intense public and governmental interest in view of the financial stake and national prestige involved in placing the Concorde into commercial service, and especially into transatlantic service.

"Under these circumstances, it is apparent that any Administration decision that would amount to an outright rejection of the applications of the two airlines for the limited service they intend to begin next year would be viewed as a serious blow by two of our closest friends and allies, whose interests coincide with our own in so many areas."

33. Any actions or inactions that prevent, delay or impede the implementation of duly-authorized Concorde landing rights to British or French flag air carriers have grave foreign policy implications for the United States. The operations of the United States flag carriers to and from the United Kingdom and France are of major importance to such carriers and depend upon reciprocal landing and takeoff rights accorded to them by the governments of the United Kingdom and France by virtue of the principles of reciprocity and non-discrimination contained in the bilateral agreements and the Chicago Convention. In the case of traffic between the United States and the United Kingdom, for example, the figures for the period July 1, 1974 to June 30, 1975, show that 2,475,214 passengers were carried between the United States and the United Kingdom on scheduled flights, of which 57 percent of the total, were carried by United States flag carriers. During fiscal 1974-75, approximately 828,000 passengers were carried between the United States and France on scheduled flights, 48 percent of which were carried by

United States flag carriers. In terms of numbers of flights, the reciprocal rights at issue are also of significance.

34. International considerations were an important factor considered by the Secretary of Transportation in his Decision and Order authorizing limited Concorde operations at JFK and Dulles. Specifically, Secretary Coleman expressly considered the following matters of international importance in reaching his determination authorizing Concorde operations at JFK and Dulles:

(a) The fact that "Concorde represents a 13-year commitment of almost three billion dollars by the British and French governments, who are among our closest allies and our best customers of United States goods. Prestige, economic vitality, and employment stability are at stake." (Decision and Order at 54.)

(b) The fact that "[s]ervice to the United States on the lucrative North Atlantic market was from the first a substantial element in the Concorde program, and denying the aircraft landing rights in this country could well abort the program." (Id.)

(c) The concern that a negative decision on the Concorde "might easily have been perceived as discriminatory for two reasons": first, that "the United States would be open to the charge that we treated our own aircraft more favorably than those of foreign countries in regulating aircraft noise," and second, that "the British and French might justifiably feel that the United States was discriminating in its attitude toward stratospheric pollution." (Id. at 54-55.)

(d) The concern that "[a]part from appearance of discrimination, the British and French might perceive in a negative decision an unfair element of surprise, a defeat of justifiable reliance," since such a decision "might well be perceived by our allies as the imposition of a penalty for which they were not given notice." (Id. at 55-56.)

(e) The fact that "the British and French might well feel that the United States had taken advantage of the benefits of the relatively free and open international aviation structure while being unwilling to pay the costs . . . . In view of the history of United States dominance of the aviation industry, it would be quite remarkable if such a decision were not considered to be unfair." (Id. at 56.)

(f) The concern that a negative decision on the Concorde might be "attributed to an arbitrary and protectionist attitude of the United States out of fear that our dominance of the world aeronautical manufacturing market is threatened." (Id. at 61.)

35. These matters of international concern expressed by the Secretary and reflected in his Decision and Order were also reflected in the presentations made to the Secretary by representatives of the British and French governments. In particular, the Honorable Gerald Kaufman, Minister of State for Industry of the United Kingdom, appeared at the January 5, 1976 hearing conducted by the Secretary and referred to "the importance which Her Majesty's Government attaches to the Concorde programme and in particular to the speedy and equitable resolution of services to the airports of Dulles and New York." At the same hearing, Monsieur Claude Abraham, Director of Air

Transport in the French Civil Aviation Department, referred to "the great significance which France attaches to the application by Air France to begin Concorde service to the United States."

36. Any actions or inactions by the defendants to prevent, delay or impede plaintiffs' Concorde operations at JFK Airport constitute an intrusion by the defendants into areas directly affecting the foreign relations of the United States and are inconsistent with the federal government's exclusive authority in the foreign relations area and its express decision authorizing Concorde landings at JFK. Such actions or inactions are invalid as they represent a clear interference with the constitutional authority of the federal government to conduct United States foreign relations.

COUNT IV

UNCONSTITUTIONAL INTERFERENCE WITH FOREIGN AND INTERSTATE COMMERCE

37. Plaintiffs incorporate by reference paragraphs 4 through 36 of this Complaint.

38. Congress under the Constitution is granted exclusive authority to "regulate commerce with foreign nations, and among the several States." U.S. Const., Art. I, § 8 (the Commerce Clause). Congress has delegated the responsibility for regulating international aviation to the FAA, the Department of Transportation and the CAB and thereby delegated to these federal agencies the responsibility for regulating air commerce.

39. Secretary Coleman determined that the Concorde should be granted landing rights at JFK and Dulles because, among other things, Concorde flights would facilitate "international trade, commerce and cultural exchange." (Decision

and Order at 22.) Interference by the defendants with this Decision and Order is a clear intrusion into the regulation of international commerce, which has been entrusted exclusively to the federal government.

40. Any actions or inactions by defendants preventing, delaying or impeding the authorized Concorde operations at JFK -- the principal airport for transatlantic service in the United States and the major link with other air routes connecting with international flights -- would substantially impair international trade and commerce and the need for uniformity of regulation. Any such actions or inactions by the defendants are, therefore, invalid as an impermissible interference with federal regulation in violation of the Commerce Clause.

WHEREFORE, plaintiffs pray:

1. That this Court declare invalid any action or inaction by the defendants intended to have or having the effect of preventing, delaying or impeding scheduled commercial services by plaintiffs, or either of them, with Concorde aircraft, into and out of John F. Kennedy International Airport as authorized by relevant international treaties and agreements, orders of the Civil Aeronautics Board and the President of the United States, and the Secretary of Transportation's Decision and Order of February 4, 1976;

2. That this Court enjoin the defendants and each of them, and their employees, agents, servants, and all other persons in active concert with them or any of them, from action or inaction by the defendants intended to have or having the effect of preventing, delaying or impeding, scheduled commerical service by plaintiffs, or either of them, with Concorde aircraft, into and out of John F. Kennedy International Airport

as authorized by relevant international treaties and agreements, orders of the Civil Aeronautics Board and the President of the United States, and the Secretary of Transportation's Decision and Order of February 4, 1976.

3. That this Court grant such further relief as it considers just and proper.

4. That plaintiffs have and recover their costs of suit herein.

Dated: New York New York
March 17, 1976

WILLIAM C. CLARKE

William C. Clarke

245 Park Avenue
New York, New York 10017
(212) 983-3113

and

COVINGTON & BURLING

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888 16th Street, N.W.
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ATTORNEYS FOR BRITISH AIRWAYS

ROGERS & WELLS

By John A. Wells
A Member of the Firm
200 Park Avenue
(212) 972-7000

ATTORNEYS FOR AIR FRANCE

THE HONORABLE
WILLIAM J. RONAN, CHAIRMAN
PORT AUTHORITY OF NEW YORK AND NEW JERSEY
ONE WORLD TRADE CENTER
NEW YORK, NEW YORK 10048

DEAR DR. RONAN:

THIS IS TO ADVISE YOU THAT, PURSUANT TO THE DECISION AND ORDER OF THE SECRETARY OF TRANSPORTATION OF THE UNITED STATES, THE HONORABLE WILLIAM T. COLEMAN, JR., DATED FEBRUARY 4, 1976, BRITISH AIRWAYS AND AIR FRANCE INTEND TO SCHEDULE FLIGHTS OF THE CONCORDE INTO AND OUT OF JOHN F. KENNEDY INTERNATIONAL AIRPORT BEGINNING ON OR ABOUT APRIL 10, 1976 AND TO INITIATE TRAINING FLIGHTS NEXT WEEK.

IN OUR JUDGMENT THE DECISION AND ORDER CONSTITUTES A FEDERAL AUTHORIZATION TO OPERATE THE CONCORDE INTO AND OUT OF JOHN F. KENNEDY INTERNATIONAL AIRPORT IN ACCORDANCE WITH ITS TERMS AND CONDITIONS. OUR COUNSEL ADVISES THAT THE PORT AUTHORITY DOES NOT HAVE THE LEGAL RIGHT TO REFUSE TO ALLOW US TO OPERATE AT KENNEDY AIRPORT IN THE LIGHT OF THE PERMISSION WHICH HAS BEEN GRANTED BY THE FEDERAL GOVERNMENT. ADDITIONAL AUTHORITY TO OPERATE IS ALSO CONFERRED BY THE FOREIGN AIR CARRIER PERMITS ISSUED BY THE CIVIL AERONAUTICS BOARD, APPROVED BY THE PRESIDENT, AUTHORIZING FLIGHTS TO NEW YORK, THE INTERNATIONAL TREATIES AND AGREEMENTS IN FORCE BETWEEN THE UNITED STATES ON THE ONE HAND AND BRITAIN AND FRANCE ON THE OTHER, AND VARIOUS FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS.

OUR PERSONNEL WILL BE IN TOUCH WITH YOUR STAFF SHORTLY TO PLAN THE OPERATIONAL ARRANGEMENTS INVOLVED IN THE INITIATION OF SERVICE.

SINCERELY,

AIR FRANCE
CLAUDE LALANNE
SENIOR VICE PRESIDENT
NORTH AND CENTRAL AMERICA

BRITISH AIRWAYS
GORDON DAVIDSON
CONCORDE DIRECTOR
OVERSEAS DIVISION

34 a

Commissioners
William J. Ronan, Chairman
William J. Ronan, Jr., Vice Chairman
Angelo A. Arena
George E. Deshaye
Robert H. Kasper
Lee A. Gaines
Jerome Hellmann
Jerome F. Kerkhoff III
Gerard J. Lacey
Matthew J. Rinaldi
Alan Sagner
Victor H. Yanitelli, S.J.

Office of the Chairman

March 12, 1976

Dear Mr. Lalanne:

This will acknowledge receipt of your letter which we received by Telex on March 11, 1976.

On the same date, the Board of Commissioners of the Port Authority unanimously adopted the attached resolution which denies permission for supersonic transport operations at John F. Kennedy International Airport pending further action by the Board after it receives a report evaluating supersonic operations experience over a six-month period at Dulles International, Heathrow and DeGaulle Airports.

There is, therefore, no need for your personnel to contact our staff for the purpose you stated in your letter, to plan operational arrangements for scheduled Concorde service at Kennedy beginning on or about April 10, 1976 and for training flights next week by the Concorde at Kennedy International Airport.

Sincerely yours,

William J. Ronan
Chairman

attach.

Mr. Claude Lalanne
Senior Vice President
Air France
1350 Avenue of the Americas
New York, New York 10019

Telex copy to Gordon Davidson, British Airways

Kennedy International Airport - Concorde Operations

The Executive Director recalled to the Board that on July 12, 1951 the Committee on Operations had adopted a Port Authority air terminal regulation providing that no jet aircraft may land or take off at a Port Authority air terminal without permission. This rule reflected the Authority's concern that noise from jet-powered aircraft would prove far more annoying to airport neighbors than that produced by piston aircraft.

Subsequently, Port Authority acoustics consultants developed a method for measuring a listener's reaction to this new aircraft noise, the perceived noise decibel, and, from 1958 to the present time, the Committee on Operations has used the PNdB to establish the Terms and Conditions governing jet operations at Port Authority airports.

The Port Authority's present jet Terms and Conditions at Kennedy International Airport require that takeoffs by jet aircraft be so planned and conducted that the noise level of 112 PNdB as measured on the ground in the neighboring communities will not be exceeded. Jet aircraft must also make over-water takeoffs during nighttime hours. The aviation industry, responding to the aircraft noise problem, has in recent years introduced jet aircraft that are quieter than their predecessors with one exception, the supersonic transport.

Airport operators and airport neighbors have therefore been apprehensive about the addition of noisier air transports to the civil aviation fleet - the airport neighbors because of the possible adverse effect such transports will have on their environment and the airport operators for the additional reason that the courts have imposed on them, and not on the Federal Government or the air carriers, financial liability for damages (takings) to neighboring property caused by the noise of low flying aircraft operating at public airports.

The Executive Director reviewed with the Board both the Federal Aviation Administration's final environmental impact statement relating to the request by British Airways and Air France for an amendment to their operations specifications to permit these carriers to fly the supersonic Concorde aircraft in limited commercial service at Kennedy International and Dulles International Airports and the February 4, 1976 decision of the Secretary of Transportation of the United States, William T. Coleman, Jr., directing the FAA to issue provisional amendments to such operations specifications. The restrictive amendments, which the Secretary justified on the basis of the Concorde's significantly different environmental characteristics, will permit each airline to

conduct during daylight hours up to two Concorde flights per day into Kennedy and one Concorde flight per day into Dulles, for a period of no longer than 16 months from the commencement of commercial service, subject to revocation at any time upon four months' notice or immediately in the event of an emergency being harmful to the health, welfare or safety of the American people.

At the direction of the Governor of New York, New York State's Commissioners of Transportation and Environmental Protection, Raymond Schuler and Ogden Reid, appeared before the February 25, 1976 meeting of the Operations Committee to express in detail the State's reasons for recommending that the Concorde be denied permission to use Kennedy International Airport. Excessive noise was identified by them as the principal objection to the Concorde. In addition, the Legislature of the State of New York has passed and the Governor has signed, proposed legislation that would mandate the Port Authority to deny permission to such aircraft to use Kennedy International Airport. Concurrent proposed legislation is pending in New Jersey.

Although it is claimed that the Concorde would meet the Port Authority's 112 PNdB standard by executing a low altitude turn shortly after take-off, the environmental impact statement and the Secretary's decision raise a number of significant questions concerning the effect of low frequency noise and vibrations generated by the Concorde and the airplane's overall impact on the noise environment in the area surrounding Kennedy. As Secretary Coleman points out, the Concorde's individual noise events will disturb more airport neighbors than the comparable range subsonic aircraft. The area exposed by the Concorde's take-off noise levels will be 47.6 square miles, approximately 6 times that exposed by the Boeing 707 and 15 times that by the Boeing-747. On landing, the area exposed by the Concorde, 11.1 square miles, will be approximately 5 times that exposed by the Boeing-707 and 20 times that by the Boeing-747. In addition, the Concorde engines generate low frequency energy and, consequently, induce higher levels of noise and structural vibrations in homes and other structures than do subsonic aircraft. The unique noise characteristics of the Concorde and the expected aggravated community response to this noise add new and serious dimensions to the present aircraft noise problem, one not necessarily reflected in the Port Authority's current noise standard.

Secretary Coleman has therefore concluded that the subjective characteristics of noise response to the Concorde "may best be evaluated through a controlled demonstration period of sufficient length to enable an assessment, after the initial publicity has subsided, of community

reaction to Concorde noise." He has therefore directed the FAA, the proprietor of Dulles International Airport, to permit the Concorde to operate at that airport. At Dulles, a facility double the size of Kennedy, less than 1,000 residents will be included within the noise exposure forecast 30 noise impact contour and none within the NEF 40 severe noise impact area. However, according to the environmental impact statement there are 485,000 persons within the NEF 30 contour at Kennedy and 112,000 within the NEF 40 contour. It does not appear to be in the public interest to test the subjective characteristics of noise response to the Concorde in the densely populated areas around Kennedy International Airport. In this regard it was noted that the Secretary had expressed the opinion that the elimination of Kennedy International Airport "would greatly diminish, but . . . would not destroy, the validity of the demonstration." It is clear from the foregoing that a test at Dulles is clearly preferable as the actual performance and environmental results could be monitored without impacting so large a residential population. It is accordingly recommended that the Port Authority defer any action to permit supersonic aircraft, including the Concorde, from operating at Port Authority air terminals for a period not to exceed 6 months following the commencement of regular commercial operation of the Concorde at Dulles Airport.

It is further recommended that the Director of Aviation analyze the Concorde flights at Dulles, Heathrow and DeGaulle Airports and the communities' reaction thereto, and study the results of the Department of Transportation's mandated monitoring program for such 6 month period, and, if necessary, request the FAA to modify its program in order to provide the Port Authority with required data, or otherwise secure data, which would enable the Port Authority to apply this information to communities surrounding Kennedy International Airport.

In addition, the liability of the Port Authority for any claims for damages arising out of the Federally mandated operation of such aircraft requires a most thorough-going review and it is directed that General Counsel proceed to research and study the question, to contact the appropriate Federal agencies for possible liability coverage and to assess the airline operator's responsibility as well.

Whereupon, the following resolution was unanimously adopted:

RESOLVED, that the Port Authority deny permission to operate any supersonic aircraft, including the Concorde, at Kennedy International Airport, until after at least six months of operating experience has been evaluated, after a report on such experience has been made to the Board and pending further action thereon by the Board; and it is further

RESOLVED, that the Director of Aviation is directed to analyze Concorde flights for a period of six months at Dulles International Airport and also at Heathrow and DeGaulle Airports, the community reaction thereto, the results of the Department of Transportation mandated monitoring program at Dulles, and, if necessary, request the Federal Aviation Administration to modify such program, or otherwise to secure additional information concerning the Concorde's noise and other environmental characteristics; and it is further

RESOLVED, that the Executive Director be and he hereby is authorized to retain such number of consultants in connection with the foregoing study as he may deem advisable; and it is further

RESOLVED, that the Executive Director and the Director of Aviation be and they hereby are directed, at the end of the foregoing six month program, based upon analysis of noise data and community reaction thereto, to make a recommendation to the Commissioners as to the acceptability of supersonic operations at Kennedy International Airport.

Whereupon, the meeting was adjourned.

_____

Secretary

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs,

- against -

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY and WILLIAM J. RONAN,
W. PAUL STILLMAN, JAMES G. HELLMUTH,
VICTOR R. YANITELLI, ANDREW C. AXTELL,
GEORGE F. BERLINGER, MILTON A GILBERT,
ROBERT R. DOUGLASS, JAMES C. KELLOGG, III,
GUSTAVE L. LEVY, MATTHEW NIMETZ,
ALAN SAGNER,

Defendants.

- -X

ANSWER

76 Civ. 1276

Assigned to
Judge Milton Pollack

Defendants, The Port Authority of New York and New Jersey (hereinafter referred to as the "Authority"), and the individual defendants above-named, by their attorney PATRICK J. FALVEY, answering the Complaint herein, show to this Court and allege:

I. Deny each and every allegation set forth in paragraph "1" of the Complaint except admit that this purports to be a suit for declaratory and injunctive relief brought by plaintiffs on the bases set forth therein.

II. Admit each and every allegation set forth in paragraphs "2", "3", "5", "7", "8" and "15" of the Complaint.

III. Admit each and every allegation set forth in paragraph "4" of the Complaint, except respectfully refer the Court to the various statutes, agreements, orders, rules, specifications and decisions mentioned therein.

IV. Admit each and every allegation set forth in paragraph "6" of the Complaint, except respectfully refer the Court to the publications of the Department of Transportation, United States of America, "The Secretary's Decision on Concorde Supersonic Transport," dated Washington, D. C., February 4, 1976, a copy of which was filed with the Court by plaintiffs, and "Statement of Secretary of Transportation William T. Coleman, Jr., Regarding the Port of New York and New Jersey's Resolution Banning Concorde Flights into JFK Until There Have Been Six Months of Such Flights at Dulles," a copy of which is attached hereto and designated defendants' Exhibit 1.

V. Deny each and every allegation set forth in paragraph "9" of the Complaint, except admit that by resolution dated March 11, 1976 and attached to the Complaint as Exhibit B, the defendant Authority denied permission to operate any supersonic aircraft, including the Concorde, into or out of JFK and respectfully refer the Court to such resolution for the terms, provisions and grounds thereof.

VI. Deny each and every allegation set forth in paragraph "11" of the Complaint, except admit that Secretary Coleman issued a Decision and a Statement referred to in paragraph "IV" hereof and respectfully refer the Court to the said documents and further respectfully pray that this Court take judicial notice of the various statutes set forth in that paragraph of the Complaint.

VII. Deny each and every allegation set forth in paragraph "12" of the Complaint, except respectfully pray that this Court take judicial notice of the various statutes and regulations set forth in that paragraph of the Complaint.

VIII. Admit each and every allegation set forth in paragraph "13" of the Complaint, except deny that the Federal government has developed a broad and comprehensive scheme to control and regulate aircraft noise levels and further deny that pursuant to the Noise Control Act of 1972 the FAA Administrator has pursued a broad federal regulatory program to control and abate aircraft noise.

IX. Admit each and every allegation set forth in paragraph "14" of the Complaint, except deny the allegation that "Such permits contain no terms, conditions or limitations affecting the type of aircraft that may be flown by British Airways and Air France in performing the authorized air transportation."

X. Deny each and every allegation set forth in paragraph "16" of the Complaint, except admit that in response to applications filed by plaintiffs, Secretary Coleman's Decision and Order was issued and the Court is respectfully referred to the said Decision and Order for the terms and provisions thereof.

XI. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "17" and "18" of the Complaint, except respectfully refer to the Secretary's Decision and Order for a discussion of the relevant factors considered by him in reaching his Decision and Order and his findings thereon.

XII. Deny each and every allegation set forth in paragraphs "19", "20" and "21" of the Complaint, except respectfully refer all questions of law to this Court.

XIII. Deny each and every allegation set forth in paragraph "23" of the Complaint, except admit that the United Kingdom and the Republic of France are parties to various aviation agreements with the United States.

XIV. Deny each and every allegation set forth in paragraphs "24", "25", "26" and "27" of the Complaint, except respectfully refer this Court to the Bermuda and Paris Agreements and the Chicago Convention for the terms thereof and admit that JFK is an airport open to public use by United States aircraft and the Concorde has been duly certified by the competent authorities of the United Kingdom and France as airworthy.

XV. Deny each and every allegation set forth in paragraph "28" of the Complaint, except respectfully refer all questions of law to this Court.

XVI. Allege that they are without knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph "30" of the Complaint, except deny that any treatment afforded foreign air carriers by the defendants has a direct impact on the conduct of foreign relations by the United States and admit that British Airways and Air France are operated by the Governments of their respective countries.

XVII. Allege that they are without knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs "31", "32" and "33" of the Complaint, except deny that any actions or inactions on the part of these answering defendants would have "grave foreign policy implications for the United States" as alleged.

XVIII. Deny each and every allegation set forth in paragraph "34" of the Complaint, except admit that Secretary of Transportation Coleman considered international obligations, international dimension and international relations, among other matters, and respectfully refer the Court to the said Decision and Order and the contents thereof.

XIX. Allege that they are without knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph "35" of the Complaint.

XX. Deny each and every allegation set forth in paragraph "36" of the Complaint.

XXI. Deny each and every allegation set forth in paragraphs "38" and "40" of the Complaint, except respectfully refer all questions of law to this Court.

XXII. Deny each and every allegation set forth in paragraph "39" of the Complaint, except respectfully refer this Court to the Decision and Statement of Secretary Coleman referred to in paragraph IV herein.

WHEREFORE, Defendants pray that this Complaint be dismissed together with the costs and disbursements of this action.

Dated: New York, N. Y.
April 5, 1976

PATRICK J. FALVEY
Attorney for Defendants
Office & P. O. Address
One World Trade Center
New York, New York 10048

Tel: (212) 466-7698

EXHIBIT 1 - Pg. 45-47

DEPARTMENT OF TRANSPORTATION

45a NEWS

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20590

FOR IMMEDIATE RELEASE
March 24, 1976

DOT R-11-76
Phone: (202) 426-4321

STATEMENT OF SECRETARY OF TRANSPORTATION WILLIAM T. COLEMAN, JR., REGARDING THE PORT OF NEW YORK AND NEW JERSEY'S RESOLUTION BANNING CONCORDE FLIGHTS INTO JFK UNTIL THERE HAVE BEEN SIX MONTHS OF SUCH FLIGHTS AT DULLES.

Because of numerous inquiries about his position on the resolution of the Port Authority of New York and New Jersey to postpone a decision whether to admit the Concorde until after six months of the demonstration at Dulles, the Secretary has made the following statement:

I am disappointed by the Port Authority's resolution. The demonstration of the Concorde would be much more meaningful if it were to take place simultaneously at both JFK and Dulles. Because substantially more people live in the area of JFK Airport and because many transatlantic passengers originate or terminate their flights in New York, the JFK portion of the demonstration is important to the various analyses I indicated were needed before we could be in a position to make the most responsible final decision about whether to admit the Concorde into U.S. airports. Thus the demonstration at JFK is in the overall national interest. I also believe the unique interests of the citizens of New York are adequately protected by the strict limitation on the number of flights, the close monitoring of aircraft by the FAA in conjunction with other federal agencies and the safeguard that would allow immediate termination in the event of an emergency deemed harmful to the public health. I might add that it seems to me it is also in the interest of New York as the major commercial center on the east coast to participate in the demonstration of a new technology that could be a significant benefit to international commerce. If New York does not participate it runs the risk that it will not maintain its position as the major airport for international travel to Europe.

- more -

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In my decision of February 4, however, I indicated that if "for any legitimate and legally binding reason" it should turn out that the JFK part of the demonstration could not go forward, that would not destroy, although it obviously would greatly diminish, the validity of the demonstration. This statement was made in recognition of the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights. For the present this remains the policy of the department.

The 15 month period will not begin, so far as the JFK part of the demonstration is concerned, until the first scheduled Concorde flight (of either airline) lands at or takes off from that airport. The Port Authority's resolution may therefore have the effect of significantly delaying a final decision on the vexing issue of whether the Concorde should be finally admitted.

In the event, however, that the proprietors of JFK persist in their apparent decision not to participate in the demonstration until there have been six months of demonstration flights at Dulles and in the further event that this decision is upheld in court, we will welcome the participation of JFK at the conclusion of that six months delay. It is in any event in the national interest to begin as much of the demonstration as possible as soon as possible, in order that a final decision that will be fair to the American people and the other parties concerned will not be inordinately delayed.

# # #

SIR :

Please take notice that the within is a true copy of , duly made and entered herein in the office of the Clerk of the within entitled Court.

Dated, New York, , 19

Yours, etc.,

PATRICK J. FALVEY

Attorney for
The Port Authority of New York and New Jersey
One World Trade Center
New York, N. Y. 10048

To: , Esq.

Attorney for

SIR :

Please take notice that
of which the within is a true copy will be presented for settlement and signature to

one of the of the within named Court at

in the County of , on the day of , 19 at o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated, New York, , 19

Yours, etc.,

PATRICK J. FALVEY

Attorney for
The Port Authority of New York and New Jersey
One World Trade Center
New York, N. Y. 10048

To: , Esq.

Attorney for

Index No. 76 Civ. 1277 Year 19....

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs,

- against -

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, et al.,

Defendants.

ANSWER

COPY

PATRICK J. FALVEY

Attorney for Defendants
~~The Port Authority of New York and New Jersey~~
Office and Post Office Address
ONE WORLD TRADE CENTER
Borough of Manhattan, New York City
Tel: (212) 466-7698

Due and proper service of a copy of the within is hereby admitted.

Dated, New York, , 19

Attorney for

DEPARTMENT OF TRANSPORTATION
UNITED STATES OF AMERICA

THE SECRETARY'S DECISION
ON
CONCORDE SUPERSONIC TRANSPORT

EMBARGOED
FOR
PUBLIC TRANSMISSION,
FILING AND/OR PUBLICATION UNTIL
1:15 P.M. EASTERN STANDARD (WASHINGTON) TIME
OR UNTIL END OF NEWS CONFERENCE
FEBRUARY 4, 1976,
WHICHEVER COMES FIRST

Washington, D.C.

February 4, 1976

49 a

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THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

February 4, 1976

DECISION ON THE APPLICATIONS OF AIR FRANCE AND BRITISH AIRWAYS TO OPERATE CONCORDE AIRCRAFT TO THE UNITED STATES

The issue before me is whether to permit Concorde supersonic transport aircraft, manufactured jointly by the British and French, to operate in limited scheduled commercial service to and from the United States as follows: not more than four flights per day into John F. Kennedy International Airport (JFK) located on Long Island, New York, and not more than two flights per day into Dulles International Airport located in Fairfax and Loudoun Counties, Virginia.

The procedural background is as follows: On August 29, 1975, and September 21, 1975, respectively, British Airways and Air France applied to the Federal Aviation Administration (FAA) for amendment of their respective operations specifications. 1/ In the past, approvals of requested amendments to the operations specifications of foreign air carriers have been almost automatic. Past applications for amendments have typically involved aircraft that were produced in the United States and certificated by the FAA, or aircraft that were produced in a foreign country and certificated by such country's counterpart to the FAA and were quite similar to aircraft already in service in this country. This decision on the Concorde, however, raises several unprecedented issues of public policy. The Concorde is the first commercial transportation application of the new supersonic technology, a technology used for military aircraft for over 20 years. It is of European rather than American design and manufacture, unlike the vast majority of the aircraft in use worldwide today. And its environmental impact is alleged to be significantly different from that of any civil aircraft now in commercial operation within or to the United States.

1/ "Operations specifications" include a list of the type of aircraft to be flown, the airports to be served, and the routes and flight procedures to be followed. An application for operations specifications or for amendments thereto must be approved and issued by the FAA before a foreign air carrier may begin commercial service to and from the United States. See 14 C.F.R. §129.

Because a decision to admit the Concorde could constitute a "major Federal action significantly affecting the quality of the human environment" within the meaning of the National Environmental Policy Act of 1969 (NEPA), 2/ the FAA prepared and released on March 3, 1975, a draft environmental impact statement analyzing the likely environmental consequences of permitting the aircraft to land in this country. The FAA circulated the draft for public comment. 3/ On the basis of voluminous comments and continuing research, it then prepared the environmental impact statement that was released to the public on November 13, 1975.

On that date, I also called a public hearing, to be held in Washington, D.C. on January 5, 1976. At that hearing, I listened to over seven hours of argument by proponents and opponents of the Concorde. Representatives of citizen groups, the manufacturers of the Concorde, the two foreign airlines involved, experts in technology and the environment, and American, French and British public officials addressed a series of relevant issues set forth in my Notice of Public Hearing. 4/ These issues highlighted the environmental, technological, and international factors that would have to be evaluated in reaching a decision.

On January 13 the docket for the public hearing was closed. I have reviewed the materials submitted, and a summary of new information and comment thereon has been incorporated in an Addendum to the Final Environmental Impact Statement (EIS), which I am filing today with the Council on Environmental Quality (CEQ).

Today's decision is based entirely on my review of the EIS, on the January 5 hearing, and on my subsequent review of the transcript and other written materials submitted for the record. At the public hearings, the United Kingdom's Minister of State for the Department of Industry and France's Director of Air Transport, Civil Aviation Department, each testified that there was no expressed or implied commitment that the United States was obliged to permit the Concorde to land in the United States, and no one has brought to my attention any such expressed or implied agreement.

2/ NEPA, §102(2)(C), 42 U.S.C. 4332(2)(C) (1970).

3/ The FAA held public hearings in Washington, D.C., on April 14 and 15, in New York City on April 18, 19 and 24, and in Sterling Park, Virginia, on April 21, 1975.

4/ 40 Fed. Reg. 53612 (1975).

THE DECISION

After careful deliberation, I have decided for the reasons set forth below to permit British Airways and Air France to conduct limited scheduled commercial flights into the United States for a trial period not to exceed 16 months 5/ under limitations and restrictions set forth below. I am thus directing the Federal Aviation Administrator, subject to any additional requirements he would impose for safety reasons or other concerns within his jurisdiction, to order provisional amendment of the operations specifications of British Airways and Air France to permit those carriers, for a period of no longer than 16 months from the commencement of commercial service, to conduct up to two Concorde flights per day into JFK by each carrier, and one Concorde flight per day into Dulles by each carrier. 6/ These amendments may be revoked at any time upon four months' notice, or immediately in the event of an emergency deemed harmful to the health, welfare or safety of the American people. The following additional terms and conditions shall also apply:

1. No flight may be scheduled for landing or take-off in the United States before 7 A.M. local time or after 10 P.M. local time.

2. Except where weather or other temporary emergency conditions dictate otherwise, the flights of British

---

5/ The 16 months will enable 12 months of data collection (during all four seasons) and four months of analysis.

6/ The FAA is the proprietor of Dulles and it is therefore part of my decision today to direct the Federal Aviation Administrator to permit one Concorde flight per day at Dulles by each carrier under the conditions noted. The situation with respect to JFK may be complicated by the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights. If for any legitimate and legally binding reason it should turn out that the JFK part of the demonstration could not go forward--and no one has indicated to me any such final disposition by JFK's proprietor--that would obviously be extremely unfortunate and would greatly diminish, but in my opinion it would not destroy, the validity of the demonstration.

Airways must originate from Heathrow Airport and those of Air France must originate from Charles de Gaulle Airport. 7/

3. Authorization of any commercial flights in addition to those specifically permitted by this action shall constitute a new major federal action within the terms of NEPA and therefore require a new Environmental Impact Statement. 8/

4. In accordance with FAA regulations (14 C.F.R. §91.55), the Concorde may not fly at supersonic speed over the United States or any of its territories.

5. The FAA is authorized to impose such additional noise abatement procedures as are safe, technologically feasible, economically justified, and necessary to minimize the noise impact, including, but not limited to, the thrust cut-back on departure.

I am also directing the FAA, subject to Office of Management and Budget clearance and Congressional authorization, to proceed with a proposed High Altitude Pollution Program (HAPP), to produce the data base necessary for the development of national and international regulation of aircraft operations in the stratosphere.

I herewith order the FAA to set up monitoring systems at JFK and Dulles to measure noise and emission levels and to report the result thereof to the Secretary of Transportation on a monthly basis. These reports will be made public within 10 days of receipt.

7/ As will appear, one reason this demonstration is being permitted despite the environmental problems discussed herein is to avoid discrimination against foreign manufacturers and carriers. I surely see no reason why we should treat the Concorde better than it is treated at home. Thus, I am not about to subject those who live near JFK and Dulles to noise, however slight the increment, that the British and French governments regard as too great for the neighbors of Heathrow and Charles de Gaulle.

8/ It is not contemplated that another EIS would be required to permit continuation beyond 16 months

I shall also request the President to instruct the Secretary of State to enter into immediate negotiations with France and Great Britain so that an agreement that will establish a monitoring system for measuring ozone levels in the stratosphere can be concluded among the three countries within three months. The data obtained from such monitoring shall be made public at least every six months. I shall also request the Secretary of State to initiate discussions through ICAO and the World Meteorological Organization on the development of international stratospheric standards for the SST.

8/ (Cont'd) of the six flights for which provisional permission is now being granted. It is most definitely contemplated--indeed, this is the whole point of today's decision--that the Secretary of Transportation, in deciding whether to permit continuation of the six flights, will give serious attention to the various data collected during the first twelve months, and assembled and analyzed during the demonstration's final four months, and approach the question of continuation of permission for the six flights beyond the 16th month without any presumption either way being created by today's decision. The data and analysis will be made public.

REASONS FOR THE DECISION

This decision involves environmental, technological, and international considerations that are as complex as they are controversial, and do not lend themselves to easy or graceful evaluation, let alone comparison. I shall nonetheless attempt in some detail to explain my evaluation of the most significant issues--those raised in the EIS, by the proponents and opponents of the Concorde at the January 5 public hearing, and in the submissions to the docket--and the reasons I have decided as I have. For I firmly believe that public servants have the duty to express in writing their reasons for taking major actions, so that the public can judge the fairness and objectivity of such action. Moreover, explaining our reasons in writing may help us avoid unreasonable actions. A decision that "cannot be explained" is very likely to be an arbitrary decision.

Among the issues I perceive as relevant are:

1. Am I compelled by either international or domestic law to permit or prohibit the landing of the Concorde in the United States? If I am not compelled by law to make a particular decision, what policy guidance does the law, including treaties, provide?

2. To what extent is the United States bound under international law to accept the safety determinations of France and the United Kingdom? In those areas properly within its jurisdiction, has the FAA determined that the Concorde is safe?

3. Should I consider only the impact of the proposed six flights per day in reaching my decision, or should I assume that, no matter how strictly limited my decision is today, its ultimate effect will be a major expansion of SST operations?

4. What are the environmental impacts of the Concorde in the following four categories: air quality, energy impact, climatic impact and ozone reduction, and noise and vibration?

5. What benefits will accrue from Concorde operations with respect to improved international travel and communication, technological advances in aviation, and improved international relations?

6. What accommodation will best minimize the more serious costs of Concorde operations while preserving its significant benefits, or to the extent such costs and benefits cannot now be confidently assessed, put us, without significant risk to the American people, in a position to assess them?

I. THE LEGAL FRAMEWORK

A. International Obligations

The rapid development of the aviation industry made necessary a system of agreements to facilitate international travel. A primary concern was that each nation be provided assurances of the safety of aircraft utilizing its airspace without having to conduct an extensive safety certification process for aircraft manufactured in other countries and owned by foreign airlines. In addition, a structure was needed to ensure a policy of nondiscrimination among nations and to promote fairness in granting particular routes. As a result, the United States and many other countries developed an international aviation structure designed to meet these and other objectives.

For purposes of the Concorde decision, the three most important international agreements are the Convention on International Civil Aviation (Chicago Convention) 9/ which was negotiated in 1944, and the two relevant bilateral air transport agreements. 10/ The Chicago Convention is concerned with ensuring the safety of international travel, through both the safety of the aircraft itself and the safety of the ground navigational and air traffic control systems. The Chicago Convention also established the International Civil Aviation Organization (ICAO), with multiple functions relating to the facilitation of international air travel.

Under the Chicago Convention, the aircraft of each contracting state which have been certified by such state as being airworthy are permitted to conduct non-scheduled, non-revenue flights into the territory of any other contracting state without obtaining prior permission. 11/ Thus the United Kingdom and France have treaty rights to conduct such non-scheduled Concorde flights into the United States. However, no scheduled commercial services by a foreign carrier may be operated into any nation unless with the express permission of that nation. 12/

9/ 61 Stat. 1180, T.I.A.S. No. 1591 (August 9, 1946).

10/ United States-France Air Transport Services Agreement, 61 Stat. 3445, T.I.A.S. No. 1679 (March 27, 1946); Bermuda Agreement, 60 Stat. 1499, T.I.A.S. No. 1507 (February 11, 1946).

11/ Chicago Convention, art. 5.

12/ Id., art. 6.

Routes for scheduled international travel are fixed by agreement between individual nations rather than through a multilateral structure. The United States has negotiated bilateral air transport agreements with both the United Kingdom and France which precisely specify routes and the method of apportioning service on those routes among the flag carriers of the two nations. The bilaterals do not specify the type of equipment that may be used.

Article 2 of the Bermuda Agreement, the bilateral agreement between the United States and the United Kingdom, provides that:

> "[t]he designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfill the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers."

Article II(b) of the bilateral agreement between the United States and France contains an identical provision. In addition, the Bermuda Agreement, in language similar to that found in the bilateral with France and the Chicago Convention, provides that:

> "[t]he laws and regulations of one Contracting Party relating to entry into or departure from its territory of aircraft engaged in international air navigation or to the operation and navigation of such aircraft while within its territory shall apply to aircraft of the designated air carrier or carriers of the other Contracting Party." 13/

Pursuant to these reservations of authority, the Civil Aeronautics Board has certain authority to regulate foreign air carriers and in appropriate circumstances to suspend, reject or cancel unreasonable or discriminatory fares in foreign air transportation, and the FAA has authority to

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13/ Bermuda Agreement, art. 5(1). See also United States-France Agreement, art. V(a); Chicago Convention, art. 11.

regulate aspects of aircraft operations that relate to safety. It is these provisions of the international agreements that also reserve to the United States the authority to deny the Concorde permission to land altogether, or to place restrictions on Concorde operations, if unrestricted permission to operate would be inconsistent with the policies expressed in the environmental laws of the United States. 14/

These provisions, and a sense of justice as well, demand that the laws of this country be applied fairly and without discrimination. 15/ There are, as shall appear later, respects in which a total ban of the Concorde at

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14/ The United States could conceivably be bound by international standards relating to environmental characteristics under certain circumstances, but those circumstances do not prevail here. Under article 37 of the Chicago Convention, ICAO may promulgate international standards on a wide variety of subjects, including the airworthiness of aircraft. Nations which agree to be bound by those standards must then accept them as definitive regulations with respect to aircraft in international service. Contracting nations may, however, under article 38, notify ICAO that they will refuse to be bound by particular international standards or that they will require observance of more stringent standards, and those standards will then not be binding on aircraft operating in that country. If, under these provisions, ICAO promulgated noise and pollution standards for supersonic transport aircraft, and if the United States did not except itself from those standards, then this nation would not be able to impose more stringent standards on foreign aircraft operating into this country. ICAO has not promulgated international noise or pollution standards for SSTs, however, and the United States is therefore free to regulate unilaterally the operations of the Concorde in this country, or to ban it altogether, for environmental reasons.

15/ Article 11 of the Chicago Convention provides that "the laws and regulations of a contracting State... shall be applied to the aircraft of all contracting

this time, without giving it any chance to prove itself, could conceivably be attacked as discriminatory. However, I do not feel that the provisional and restricted order I issue today can justly be so attacked. It is true that this is the first time that NEPA has been applied to requests by foreign air carriers to conduct operations into this country, but this is the first such request to operate with equipment that was not already in operation before the enactment of that statute. The Concorde is sufficiently different from subsonic jet aircraft in its environmental characteristics that admission on a trial basis and the imposition of different operating requirements are amply justified.

B. Domestic Law

The requirement that foreign air carriers operate in accordance with operations specifications was devised, in

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15/ (Cont'd) States, without distinction as to nationality...." In the history of the proceedings from which article 11 evolved, some further guidance on what constitutes nondiscrimination is found. "[N]o Contracting State shall require any aircraft of another Contracting State to obey regulations relating to flight procedures, traffic control, safety requirements, and the like, or relating to public safety and order, which are more restrictive than those imposed on its own aircraft engaged in international navigation." (Emphasis added.) Proceedings of the International Civil Aviation Conference, pp. 558-559 (Department of State Pub. 2820; 1948, 1949). In addition, article 15 of the Convention requires that "every airport in a contracting State which is open to public use by its national aircraft shall likewise...be open under uniform conditions to the aircraft of all other contracting States." (Emphasis added.)

The bilateral agreements also evidence an intent to prohibit discrimination between aircraft of the United States and those of France and the United Kingdom. Article II of both agreements provides that the air carriers of one State may be required to show that they can comply with "laws and regulations normally applied" by the aeronautical authorities of the other State. Article III of both agreements prohibits discriminatory treatment in assessing charges for the use of airports.

part, as a mechanism for implementing section 601 of the Federal Aviation Act, which empowers the Administrator "to promote safety of flight of civil aircraft in air commerce by prescribing...reasonable rules and regulations, or minimum standards...as the Administrator may find necessary to provide adequately for national security and safety in air commerce." 16/ A requested amendment of operations specifications can also serve other statutory ends, however. In this case, since the amendment proposed (to permit Concorde operations) could constitute a "major Federal action significantly affecting the quality of the human environment," 17/ NEPA applies to the decision. Thus, here, the operations specifications decision is the mechanism by which both safety and environmental mandates are brought to bear. The authority to administer the Federal Aviation Act was vested in the Secretary of Transportation by the Department of Transportation Act of 1966 (DOT Act), but the duties relating to aircraft safety were transferred by the DOT Act back to the Administrator, in order to ensure the continuity of the FAA's safety programs. 18/

Pursuant to this statutory framework, I am relying on the Administrator's determination that the Concorde meets the FAA's applicable safety requirements, though I would add that my review of the record has indicated that the Administrator's safety determination is amply supported. The overall decision whether to permit Concorde operations into this country is much more than a safety decision, however. It involves substantial questions of environmental and aviation policy and international relations. As the Secretary of Transportation, I am charged by the DOT Act with "the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation...." 19/ I am directed "to stimulate technological advances in transportation...(and) provide general leadership in the

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16/ 49 U.S.C. §1421 (1970); See also FA Act §313(a), 49 U.S.C. §1354(a) (1970).

17/ NEPA §102(2)(C), 42 U.S.C. §4332(2)(C) (1970).

18/ DOT Act §6(c)(1), 49 U.S.C. §1655(c)(1) (1970).

19/ Id. §2(a), 49 U.S.C. §1651(a) (1970).

identification and solution of transportation problems...." 20/ Under the Federal Aviation Act, as amended by the DOT Act, I am also instructed to "encourage and foster the development of civil aeronautics and air commerce in the United States and abroad." 21/ I have therefore decided to make the policy decision myself, pursuant to my authority under the DOT Act and to my authority under those sections of the Federal Aviation Act whose authorities remain vested in the Secretary of Transportation. 22/

Two environmental statutes are of particular relevance to my decision in this case--the Noise Control Act of 1972 23/ and the National Environmental Policy Act of 1969. Under the Noise Control Act, which is relevant insofar as it provides policy guidance for the decision, the Federal Aviation Administrator, after consultation with the Secretary of Transportation, is required to promulgate such regulations governing aircraft noise as he may find necessary. 24/ Among the facts the Noise Control Act requires the Administrator to consider is whether a proposed standard is "economically

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20/ Id. §2(b)(1), 49 U.S.C. §1651(b)(1) (1970).

21/ FA Act §305, 49 U.S.C. §1346 (1970).

22/ See §103 of the FA Act, 49 U.S.C. §1303 (1970): "In the exercise and performance of his powers and duties under this Act the Secretary of Transportation shall consider the following, among other things, as being in the public interest: (a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense; (b) the promotion, encouragement, and development of civil aeronautics; and (c) the control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both...."

23/ 86 Stat. 1234.

24/ Noise Control Act of 1972, §7(b), amending the FA Act §611, 49 U.S.C. §1431 (Supp. III, 1973). Under the Noise Control Act, the Environmental Protection Agency (EPA) proposes rules to the FAA, which must publish the

reasonable, technologically practicable, and appropriate for particular type of aircraft [or] aircraft engine...." 25/

The Administrator has exercised this authority with respect to subsonic aircraft, 26/ but he has not promulgated a noise rule applicable to supersonic aircraft, although the EPA has proposed several alternatives. 27/ It is significant that with respect to subsonic aircraft the Administrator did not impose noise standards on aircraft already built prior to the promulgation of the standard. Moreover, the decision not to act precipitously on supersonic aircraft should not be surprising in light of the history of the development of the supersonic transport. During the early developmental stages of this type of aircraft, both in the United States and Europe, the technological capacity to

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24/ (Cont'd) proposed rule in 30 days and commence hearings in 60 days. Within a reasonable time the FAA must promulgate the rule, either as proposed or with modifications, or must publish a notice declining to promulgate the rule and explaining the reasons for the action.

25/ FA Act §611(d)(4), 49 U.S.C. §1431(d)(4) (Supp. III, 1973).

26/ See 14 C.F.R. §36. The FAA promulgated this rule, Federal Aviation Regulation, Part 36 (FAR 36) after more than a decade of experience with jet aircraft in commercial operation. The FAR 36 standards were originally applicable to aircraft certificated by the FAA after 1969. In 1974, however, the standards were applied to aircraft which had been issued a type certificate before 1969 but which had not been flown before 1974. This change was made largely to bring within the regulation's coverage the newly produced versions of older jets for which technology had been developed to enable them to meet FAR 36. The federal government has since developed the technology to retrofit older jets such as the Boeing 707 and the DC-8, which heretofore have not been covered by the noise regulations. Adoption of a retrofit rule and legislation, if necessary, are now under consideration. The history of aircraft noise regulations thus indicates that noise requirements have been derived from the development of adequate noise suppression technology.

27/ On February 27, 1975, EPA submitted to the FAA recommended noise standards for the SST that would have made

minimize the noise levels generated by an engine sufficiently powerful to drive a supersonic transport was uncertain. Promulgation of a feasible noise rule at that time would therefore have been highly speculative. By the time scientists had gained a sense of the limits on the ability to control supersonic aircraft noise levels, the design of the Concorde was fixed and, for all practical purposes, immutable. 28/

27/ (Cont'd) FAR 36 standards applicable to future production SSTs, those upon which substantive production effort was commenced after March 28, 1975. Current SSTs were not included in this proposal, but EPA suggested eight possible options for consideration ranging from exemption of the original 16 Concordes from any noise requirements to prohibition of their operation in the United States. EPA recommended option 3, which would have allowed SST operations at U.S. airports designated by the FAA as suitable, if accepted by the local airport operator, and subject to certain specified operating restrictions. EPA did not elaborate on what airports would be appropriate, although in his testimony on December 9, 1975, before the House Government Operations Subcommittee on Government Activities and Transportation, EPA Administrator Russell Train stated that JFK would not be suitable and Dulles was questionable. At my January 5 hearing, EPA Assistant Administrator Roger Strelow recommended that Concorde be banned from both JFK and Dulles. He was not able to suggest any United States airport where such landings should be permitted. On January 14, EPA transmitted to FAA a new SST noise proposal that would apply the FAR 36 standards to any aircraft, including supersonics, that did not have flight time before December 31, 1974, the cutoff date now applicable to United States subsonic planes. FAA will publish this notice in the Federal Register. A copy of this proposal was submitted on January 13 to the docket in this proceeding. On January 8, 1976, Russell Peterson, Chairman of the Council on Environmental Quality, recommended that all commercial Concorde flights into the United States be banned.

28/ In order to design the aircraft, the British and French had to choose an engine and then design the aircraft around that engine's capabilities. Thus the

I must therefore conclude that the absence of a noise rule promulgated under the Federal Aviation Act does not compel a decision either way on whether the Concorde should be permitted to land. I do believe, however, that I have a statutory obligation to consider in the present context those factors the Federal Aviation Act lists as important in a decision to promulgate a noise rule. Thus, I have concluded that the impossibility of reducing the noise level of the Concorde is a relevant factor in my decision--that as I weigh the various competing considerations I should remain aware that the British and French would not be able to modify this first generation of Concordes to reduce the noise impact.

My obligation to consider whether the environmental impact of the Concorde compels me to restrict or ban Concorde operations in the United States also arises from the National Environmental Policy Act of 1969. NEPA "makes environmental protection a part of the mandate of every Federal agency and department." 29/ The reach of NEPA extends beyond the procedural requirements of preparing an EIS and the specific legislative prescriptions of other environmental laws and compels me to undertake "a rather finely tuned and 'systematic' balancing analysis," 30/ weighing any adverse effect on the environment against the benefits to be derived from technological progress and international cooperation. If I should find that the benefits that would accrue from

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28/ (Cont'd) engine itself was a fixed quantity very early in the design process and attempts to reduce the engine's noise levels without unacceptable reductions in thrust were unsuccessful. The manufacturers of the Concorde would be unable to modify the engine or redesign the Concorde to meet restrictive noise levels. Since the Concorde is the only aircraft for which application to land has been made, and therefore to which a noise regulation might currently apply, the promulgation of such a rule, insofar as it had present applicability, would have been nothing more than a decision to grant or deny the Concorde the right to operate into the United States.

29/ Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

30/ Id. at 1113.

an unlimited approval do not justify the environmental consequences, I have the authority to deny the application or to approve it conditionally or temporarily.

Compliance with NEPA requires not only that I heed the policy prescribed by that Act, but that I comply with its procedural requirements as well. I have carefully examined the final EIS, filed today, and I have concluded that it fully and accurately assesses the environmental consequences of the proposed operations. 31/

31/ During the course of public comment on the draft impact statement, there were numerous assertions that the impact statement was deficient for one reason or another. Partly as a result, the final impact statement was far more detailed. Nonetheless, I continued to hear frequent suggestions that the draft statement was so deficient that the proposed EIS should be republished as a draft. Although I understand the desire of the public to comment on a draft that resembles the final as closely as possible, I have found the vehement criticism of the draft, particularly by comparing it to the final EIS, inconsistent with an important objective of responsible government. Massive effort went into the production of the draft and final impact statements, and assertions that alterations in substance between the draft and the final should require the publication of a second draft undoubtedly discourage civil servants from admitting and correcting their mistakes. The substantially more complete final EIS illustrates the process of government working at its best, not the need to prolong the NEPA process by the requirement of an additional draft.

In order to ensure full public discussion on the EIS and to satisfy myself of its completeness and objectivity, I took several additional steps not commonly part of the process of preparing an EIS. Specifically, I released a proposed EIS in advance of the decision, heard testimony at a public hearing, extended the

As I have indicated before, I have accepted the Federal Aviation Administration's determination that the Concorde meets all United States safety requirements applicable to the aircraft of foreign air carriers operating in United States airspace. Because of the substantial public interest in safety issues, however, I invited comments on this subject at the January 5 public hearing. At the conclusion of that hearing, I directed the Federal Aviation Administrator, who was present throughout, to review the testimony and the material submitted for the record prior to January 13, and

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31/ (Cont'd) comment period to January 13, and asked the FAA to prepare an Addendum to the EIS on the basis of comments received on the docket during that time. I am now quite satisfied that the process of comment and revision are fully adequate to support a decision in this matter. In a letter to me dated January 8, 1976, which is in the public docket, CEQ Chairman Russell Peterson evidently concurred in this conclusion on the EIS. He wrote "We believe it is a thorough and thoughtful analysis of the impacts of permitting such operations; your Department is to be complimented for having produced it. In addition, your personal efforts to encourage full and meaningful public dialogue on the Concorde are most commendable."

One participant at the public hearing suggested that the EIS is inadequate for failing to discuss safety issues. I must disagree that NEPA requires the FAA to prepare impact statements in connection with every safety decision. The Federal Aviation Act establishes a specific procedure for the regulation of aviation safety; NEPA does not append to that process a requirement that impact statements on each decision be prepared unless, as here, the decision will have a substantial environmental impact aside from safety questions of a technological nature. Moreover, the EIS does in fact consider those safety aspects that could be deemed to have environmental effect.

to advise me of his findings. I have reviewed those conclusions and find them amply justified, for reasons I have outlined in Appendix I. The Federal Aviation Administrator's conclusions are set forth in Appendix II. 32/

32/ The FAA's authority to make a safety determination is somewhat circumscribed by the Chicago Convention, in the interest of facilitating entry of our aircraft into foreign airports, and of foreign aircraft into our airports. The United States is required by article 33 of the Chicago Convention and by the Bilaterals to recognize as valid the certificates of airworthiness issued by any other member state, "provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention." The ICAO has in Annex 8 established extensive minimum safety requirements; to the extent that any member country, in certifying its aircraft, imposes requirements as stringent as those in Annex 8 or more so, the United States is required by treaty to accept that airworthiness determination, unless we have notified ICAO of our intention to take exception under article 38.

On October 10, 1975, and December 5, 1975, the French and British aviation authorities, respectively, certified the Concorde as airworthy, and to the extent that the FAA does not specifically regulate to the contrary, the FAA is bound by treaty to accept these determinations. Issues upon which the FAA has made an independent safety determination include the Concorde's ability to operate in the United States air traffic system, and its ability to comply with United States fuel reserve requirements. The safety of the 26 degree bank turn which the airlines propose to execute off the end of Runway 31 Left at JFK to comply with the Port Authority's noise regulations has also been thoroughly tested. The FAA has accepted the British and French airworthiness determinations respecting range, explosive decompression, exposure to cosmic radiation, and temperature shear.

If a United States carrier purchases or leases a Concorde, it must receive a United States type certificate, and before issuing such a certificate the FAA will conduct a complete safety examination, and will require full compliance with all applicable regulations.

II. POLICY FRAMEWORK

Having concluded that I am not compelled by treaty or domestic law to admit the Concorde, and having accepted the Federal Aviation Administrator's conclusion that the Concorde complies with all applicable United States safety requirements, I now must address, as an imperative of sound public policy, whether authorization of the proposed commercial flights of the Concorde is contrary to the national interest or inconsistent with any federal statute.

This obligation requires that I evaluate the benefits to the American people of the proposed Concorde flights, the advantages of introducing commercial supersonic technology to the United States at this time, and the international implications of this decision. It requires further that I accept the mantle of responsibility proffered by NEPA to serve "as trustee of the environment for succeeding generations" assuring "for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings." 33

These considerations cannot be completely reconciled in reaching a decision--if by reconciliation one means a decision that will receive universal acclaim--but their significance for today's generation and their consequences for tomorrow's must be articulated, weighed, and evaluated. Unfortunately, there exists no common denominator by which we may compare the values we assign to each. There is not any general consensus from which there will miraculously spring a controlling standard. It is also undeniable that one's perspective is inescapably shaped by his profession, his experience and his concept of the public interest. Government agencies are no exception: the Environmental Protection Agency, the Council on Environmental Quality and the Federal Energy Administration are opposed to the Concorde for environmental and energy reasons, while the Department of State and the National Aeronautics and Space Administration are in favor for reasons of international cooperation, technological progress, and aviation policy. This does not mean that I have not accorded great respect to the advice of these federal agencies; I have evaluated their recommendations--to the best of my ability--objectively and on the merits.

33/ NEPA §101(b)(2), 42 U.S.C. §4331(b)(2) (1970).

Our task is further complicated by the fact that some of the values involved can be described and quantified with precision, while others, equally important to their advocates, are more hypothetical, speculative and subjective. It would be plain error, however, to ignore or discount a value simply because it cannot be reduced to numbers. And it would be error still plainer to imagine we can escape decision because decision is difficult.

As we have benefitted from the advances of science and technology, so must we welcome technological innovation, recognizing that what is new is unknown and that progress is possible only with some tolerance and assumption of risk. But as we have established our commitment to environmental enhancement, so must we recognize that transportation improvements must meet environmental standards.

As we have promoted our aviation and commerce abroad, so must we deal fairly with the technology of other nations at home. But as we envision a world shrunk to half its present size by the speed of supersonic travel, so must we search for knowledge about the stratosphere and the delicate ecological balance that sustains our health and agricultural productivity.

Thus, sound public policy compels me to consider the immediate and long-term advantages that would accrue to the American people from these limited flights and then to decide whether "the public benefits flowing from the actions [outweigh] their environmental costs...." 34/

The benefits of admitting the Concorde include the significantly greater speed of this aircraft, enabling transatlantic flights in half the time needed for subsonic passage, thereby facilitating international trade, commerce and cultural exchange; the knowledge that will be gained from testing the environmental consequences and commercial viability of the Concorde in order to determine whether private capital should be committed to the development of a cleaner, quieter, more efficient SST; the advantages of securing United States participation in the international SST structure, thus putting ourselves in a position to influence international environmental, safety and atmospheric standards; and the enhancement of international cooperation and economic reciprocity. The benefits should also include

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34/ Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974).

the prevention or alleviation of potential harms, such as economic disruption in Britain and France, the threat of economic retaliation, the perception of unfairness or discrimination in the international community, and the charge that, by banning Concorde, the United States--as a possibly essential transatlantic terminus--would assure the demise of the program and preclude the development of a more environmentally acceptable second-generation SST. An important component of our calculation of benefits must also be fairness and equity, for there may have been probable cause for the British and French to rely upon a United States market when they made the resource commitment, now almost $3 billion, for the development of the Concorde.

In evaluating the costs of admitting the Concorde--noise, air pollution, fuel consumption, and stratospheric impact--we have the advantage of an established process mandated by NEPA, a thorough EIS prepared by the FAA, and the existence of reliable methods of measuring at least the objective impact of noise and air pollution. There are, however, subjective judgments that must be made as well, at present necessarily on the basis of insufficient information, about the impact of emissions on the stratosphere, the community's response to Concorde noise, and fuel efficiency in commercial service. These judgments would be aided by actual operating experience under controlled circumstances.

In assessing the environmental cost of Concorde flights, the analysis of the EIS is not limited to the proposed six daily flights. But in that regard I cannot emphasize too strongly that my decision today is firmly and unequivocally limited to not more than six flights per day, and that the authority I grant is provisional for 16 months from the commencement of operations, if not revoked earlier. During the last four months of this period and before any approval may become permanent for the six daily flights involved, an environmental reassessment will be made. 35/ Any additional flights beyond the six would require a new EIS.

I would nevertheless be blind to ignore, in my consideration of the application for these six daily flights, the possibility of a future expansion of operations if supersonic transports become commercially successful and environmentally acceptable. Under NEPA, when any decision may have consequences in the long run of a magnitude

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35/ See notes 5 and 8 *supra*.

greater than those of the project at hand, a thorough impact statement should reflect the potential long-term consequences of an expanded program, even if additional federal action and environmental analysis would be required to approve any new increment. This enables the decision-maker to be fully informed of the potential long term environmental effects of an otherwise segmented program.

Although the existing evidence about the environmental consequences of the Concorde and the substantial doubts about its commercial viability make expansion highly questionable, the EIS nevertheless thoroughly analyzes the effect of 25 flights a day to JFK and five to Dulles, based on this Department's projection of the likely maximum number of Concordes that would be needed, assuming commercial viability, to service these markets for supersonic transatlantic travel in 1987. I have reviewed this information, and have been fully cognizant of it in reaching a decision. But I wish to make absolutely clear to the manufacturers of the Concorde that I would not hesitate to bar an expansion of the number of flights, or indeed even an extension beyond 16 months of the six flights per day, if the information obtained during the 16-month demonstration shows that the noise or emissions have a significant adverse impact on the environment.

For these reasons, I believe the appropriate measure of the total costs is the adverse environmental effect of the six daily flights plus the possibility, however unlikely, that additional flights may one day be authorized.

There is, however, one possible "cost" of Concorde operations that I have not considered as part of my assessment of the disadvantages of permitting Concorde operations. It was suggested at the January 5 hearing that the Concorde will "skim the cream" off the transatlantic market, with disastrous consequences for the already troubled American flag carriers, Pan American and TWA. It has also been suggested that a relevant consideration should be the possibility that the admission of the Concorde to the United States would spell the end of the dominance of the world aviation industry by United States manufacturers, who also deserve protection by their government.

Without regard to whether those economic arguments might be true, I have refused to consider either possibility as an element of the decision I make today. I am, of course,

concerned for the welfare of the United States aviation industry, but I also believe that competition to the maximum extent possible is the best way to preserve a healthy industry. Moreover, the rules of fair competition between United States flag carriers and carriers operating the Concorde, as they affect fares, are the direct concern of the Civil Aeronautics Board. That agency is empowered to review fares and to ensure that they are compensatory, and I must therefore leave such considerations to that agency.

III. ENVIRONMENTAL CONSEQUENCES

A. Air Quality

Although there are not currently any emission standards applicable to supersonic transports, the effect of a proposed federal action on air quality is an important consideration under NEPA. The EIS describes both the absolute emission characteristics of the Concorde--the amount of pollutants generated during a single operation and the cumulative impact of the Concorde on the ambient air quality in the two airport areas. The absolute figures indicate that the Concorde emits significantly more carbon monoxide per landing/takeoff cycle than existing subsonic jets--from two and a half to ten times as much. Emission of unburned hydrocarbons is also greater, although not by as much, and the emission of nitrogen oxides is greater than that of all but the Boeing 747. 36/ The emission of particulates, however, is less than all but the DC-10.

The Concorde's emission levels for carbon monoxide and unburned hydrocarbons are also greater than those which would be permitted under the Environmental Protection Agency's proposed supersonic aircraft engine emissions standards. 37/ The smoke number, which measures the emission of visible particulates, is somewhat higher than the proposed standard. The level of nitrogen oxide emissions would probably meet proposed EPA standards.

The EIS extensively analyzes the effect of the proposed Concorde flights on ambient air quality, taking into consideration the number of flights, time of day, and wind conditions. The analysis clearly shows that the effect

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36/ In evaluating these conclusions, one must keep in mind that when we are dealing with relatively small absolute amounts, the fact that one figure is several multiples of another does not necessarily indicate that either is especially significant.

37/ Under Section 231 of the Clean Air Act, 42 U.S.C. 1859f-9 (Supp. III, 1973), EPA proposed standards that would apply to supersonic engines manufactured on or after January 1, 1979. 39 Fed. Reg. 26653 (1974). These standards have not been promulgated as final regulations.

of the proposed level of operations on the air quality is negligible. In fact, to the extent there is any impact at all, it will be only within the boundaries of the airport itself. At JFK, for example, the only measurable increase in air pollutants due to the Concorde off the airport proper is an increase of .2 parts per million in carbon monoxide concentrations. The total level is still only .7 parts per million, on a one hour average, as compared to a national standard established by the EPA of 35 parts per million. 38/ At no time will the Concorde significantly affect the air quality at Dulles.

Nothing I have received on the public docket or at the January 5 hearing has given me cause to doubt the accuracy of these figures. I have therefore concluded, in light of the relatively small number of flights, that the air quality impact of the Concorde is not significant for the purposes of this decision.

B. Energy Impact

Among this Administration's highest priorities are conservation of energy and the efficient use of fuel. I must therefore consider:

--The relative fuel efficiency of Concorde;

--Whether permitting the Concorde to land in the United States would be inconsistent with United States policy on fuel conservation and whether the Concorde would have any significant effect on the depletion of United States energy resources; and

--Whether it is appropriate for the United States to pass judgment on how the British and French governments allocate their fuel resources.

38/ For an expanded level of operations, 25 flights per day at JFK and five per day at Dulles computed on the basis of projected 1987 subsonic operation levels, the Concorde's only significant impact would be an increase in the carbon monoxide concentrations off the airport boundaries at JFK, and even with these relatively large increases the concentration level remains well below the EPA standards.

1. Fuel efficiency

The statistics in the EIS indicate that the Concorde is less fuel efficient than existing subsonic jets. In absolute terms, the Concorde consumes 20,857 gallons of fuel in a 3,000 nautical mile trip--about 50% more than any of the competing subsonics except the Boeing 747, which of course can carry over three times as many passengers as the Concorde. Because of its relatively small capacity, the Concorde also consumes more fuel per passenger mile than the subsonic jets, including the Boeing 747. 39/ Flying full, the Concorde consumes .063 gallons of fuel per passenger mile--the equivalent of about 16 miles per gallon per passenger. The Boeing 707-300, the least efficient subsonic jet among those with transatlantic range, also flying full consumes .030 gallons of fuel per passenger mile--the equivalent of about 33 miles per gallon per passenger. The other three subsonics flying full each consume about .020 gallons per passenger mile--the equivalent of about 50 miles per gallon per passenger.

The significance of these figures is not immediately apparent, however, and will not be until the Concorde is operated in commercial service on the proposed routes, since the actual load factors of the aircraft affect the fuel efficiency comparisons. If, for example, the Boeing 747 regularly flew at a load factor of around 30 percent--that is, with a number of passengers about equal to the maximum number that a Concorde can carry--and if the Concorde, charging compensatory fares, flew fully loaded then the Concorde would be more fuel efficient than the Boeing 747

39/ The EIS comparison of fuel usage by different jet aircraft for a 3,000 nautical mile trip showed the following fuel consumption:

Aircraft	Passenger Capacity	Fuel	
		Pounds	Gallons
Boeing 707-300	145	91,500	13,071
DC-8-61	200	94,500	13,500
Boeing 747	375	170,000	24,285
DC-10	250	98,000	14,000
Concorde	110	146,000	20,857

in actual transatlantic operations. I realize of course that the actual load factor for Boeing 747s is greater than 30 percent, and that the Concorde with a compensatory fare is most unlikely to operate with a 100 percent load factor. I also recognize that the Concorde, in actual operating conditions, is likely to use significantly more fuel per passenger mile than its subsonic competitors. But my general point is still valid: the comparative fuel efficiency of the aircraft, measured in terms of the amount of fuel consumed per passenger mile, will lend itself to accurate determination only when we know actual load factors for the aircraft operating at compensatory fares within the existing schedule and route structure. Thus, the market will ultimately be the best judge of relative fuel efficiency.

2. Fuel conservation policy

Although our government has traditionally preferred reliance on the price mechanism to allocate fuel resources, the national policy of energy conservation, adopted in the wake of the 1973 Arab oil embargo and subsequent oil price increases, compels us to consider government intervention to promote conservation and assure that essential fuel needs are met. Many people, for example, would be willing to spend extra money on gasoline to travel 70 miles per hour on the highway, but that use of petroleum will not in the long run benefit society as much as other uses. Consequently, we have required the states to place a 55 mile per hour speed limit on the nation's highways, not in the interest of the economically efficient allocation of fuel, but in the interest of fuel conservation (as well as safety). A similar rationale, it has been argued, should prevail for the Concorde--that is, I should forbid the Concorde from operating in order to force the use of subsonic aircraft, which very likely can transport more passengers using less fuel. 40/

Although relatively high fuel consumption is an appropriate concern under NEPA, there are several reasons I do not find persuasive the argument that Concorde should be banned for this reason. First, the increased speed of the Concorde is an offsetting factor. Speed is, after all, the chief benefit of Concorde operations, and the advantage is

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40/ The Federal Energy Administration has taken this position in a letter to the FAA dated May 6, 1975, which is a part of the public record.

considerable, both on the proposed routes and on longer routes, where seven or twelve hour trips would be made in half the time, and where world travel, communication, and the efficiency of commerce would be greatly enhanced. Although United States transportation policy must promote fuel conservation, it must also recognize the need for alternatives of faster service for certain purposes, where the consumer is willing to pay the additional fuel cost. We have not, for example, banned private jets, which average only 13.8 passenger miles per gallon, even though the passenger train may average 190 passenger miles per gallon.

Second, if I were to invoke federal fuel conservation policy as a reason for rejecting the Concorde, then I should be able to demonstrate a substantial saving of fuel. The limited flights under consideration would use 105 million gallons of fuel a year (most of it British or French), representing only .077 percent of the fuel now used annually in United States transportation. 41/ In the context of the overall United States energy conservation program, the fuel used by the Concorde is therefore not significant.

The FEA and certain participants at the public hearing have argued, however, that I should ban the Concorde as a symbolic gesture. I certainly agree with the view that this is a time when we should be encouraging more fuel-efficient technology, when Americans must learn to be more frugal in the use of our precious natural resources. As a public official, I have urged the United States aerospace manufacturers to make fuel conservation and productivity a top management priority. But it would be unfair to single out the Concorde as an appropriate symbol of United States fuel conservation policy. We did not build it. We will not pay its fuel bills. It would border on hypocrisy to choose the Concorde as the place to set an example, while ignoring the relative inefficiency of private jets, cabin cruisers or an assortment of energy-profligates of American manufacture.

Finally, United States energy policy has emphasized the improvement of fuel efficiency within each transportation mode, consistent with what is technologically feasible. We

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41/ United States Department of Transportation, A Supplement to the Summary of National Transportation Statistics (August, 1975), p. 118 (1974 preliminary data provided by CAB).

have not prohibited certain kinds of transportation simply because there are more efficient alternatives. 42/ I would certainly urge those interested in developing SST technology further to place a high priority on fuel efficiency and productivity. This warning is based not only on my assessment of market realities but also on my conviction that we may one day find that, unless greater productivity is achieved, commercial SST operations will be inconsistent with national energy policy. Indeed, in the event of some future need for fuel allocation, such allocation should be made so as not to give the carriers that fly the Concorde an extra allocation because of its higher fuel consumption. 43/ For the limited flights under consideration, however, I find that the amount of unnecessary fuel consumption of the Concorde is relatively insignificant.

42/ Our energy policy has involved programs to reduce consumption rather than outright bans on particular transportation vehicles. For example, the automotive fuel economy sections of the recently enacted Energy Policy and Conservation Act (P.L. 94-163, 89 Stat. 871 [Dec. 22, 1975], §§502, 503) provide that manufacturers achieve specified minimum levels of average fuel economy in model years following 1977. They are not prohibited from producing fuel-inefficient cars; but if they produce such cars, they must be offset by increased production of more fuel-efficient models so that the net average fuel economy attains the specified minimum levels. For a brief discussion of transportation energy policy, see my Statement of National Transportation Policy, Sept. 17, 1975, pp. 38, 39.

43/ In 1974, when the FEA imposed mandatory fuel allocation requirements on aviation fuel, foreign air carriers were allocated limited amounts of fuel. If the conservation of aviation fuel again becomes a national imperative, mandatory allocation would be a far more equitable way of saving fuel than banning a particular fuel-inefficient foreign made aircraft. British Airways and Air France would then be assured of having the option of using their limited supplies on the Concorde or on more efficient subsonic jets.

3. International dimension

Regardless of how we might evaluate the energy efficiency of United States manufactured aircraft--and I would stress that we never have imposed any controls or even established standards--I must question whether it is appropriate for the United States to tell the British and French that they may not allocate the fuel they purchase as they wish. The United States may have a responsibility to encourage other countries of the world to conserve their energy supplies, working through appropriate diplomatic channels. This responsibility should not extend, however, to denying landing rights to a foreign aircraft because we disagree with another country's fuel allocation policy.

Thus, although I do not believe that an accurate determination of the Concorde's relative fuel efficiency can be made until we observe it in actual operation, I do think it probable that the Concorde will use significantly more fuel per passenger mile than the subsonics. I also find, however, that the total consumption of fuel by the six daily Concorde flights would not be substantial and would therefore not be inconsistent with any federal energy requirement. The imposition, for the first time, of a unilateral fuel-efficiency requirement on a foreign aircraft seems unreasonable and unfair. Probable fuel inefficiency is, however, a negative factor and a cost that must be considered in the overall NEPA balancing context.

C. Stratospheric Impact

The impact of the Concorde's stratospheric emissions on the environment at the surface of the earth has perhaps raised more questions than any other facet of the impact of the Concorde. The stratosphere is a little understood layer of air above the troposphere where the air movements that determine our weather take place. The stratosphere is a relatively stagnant body of air. The temperature either remains constant or increases with increasing altitude, creating a sort of permanent inversion layer. Consequently, the stratosphere, unlike the troposphere, does not readily cleanse itself through a continual process of vertical mixing, and pollutants injected into the stratosphere remain there for relatively long periods of time. In addition, pollutants injected into the stratosphere tend to spread horizontally at a fairly rapid rate; thus, pollution over Asia pollutes the stratosphere over the United States.

Because of these unique characteristics, questions were raised during the controversy over the United States supersonic transport regarding the effect of the engine emissions on this delicate layer of air. Congress commissioned an extensive study of the effect of pollutants on the stratosphere, and based on data collected from 1971 to 1974, both the DOT Climatic Impact Assessment Program (CIAP) and the National Academy of Sciences (NAS) prepared lengthy reports. The EIS relies primarily on these reports in assessing the probable impact of Concorde operations. 44/

Concern over the impact of the Concorde's stratospheric emissions centers on two issues: the effect on the mean surface temperature of the earth, and the reduction of the density of the ozone layer and the resultant possibility of an increase in the incidence of non-fatal skin cancer.

1. Climatic Impact

There is no generally accepted theory of climatic change that explains why the mean temperature at the surface of the earth changes over long periods of time. Knowledge of specific elements in the Concorde's exhaust, however, coupled with a knowledge of the radiation absorption characteristics of the stratosphere, enable scientists to estimate very roughly the possible warming and cooling effects.

Four elements of the aircraft's exhaust may have some effect on the optical opacity of the atmosphere--that is, on the tendency of the atmosphere to prevent the sun's radiation from reaching the surface of the earth. First, sulphur dioxide combines with other elements in the stratosphere to form very fine droplets of sulphuric acid which

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44/ DOT, CIAP Report of Findings: The Effects of Stratospheric Pollution by Aircraft (Dec. 1974); National Academy of Sciences, Climatic Impact Committee, Environmental Impact of Stratospheric Flight (1975). The CIAP study covered 3-1/2 years, cost $22 million, and involved scientists in nine countries; it describes the analysis by which the climatic, biological and economic effects of pollution by aircraft in the stratosphere are assessed. The NAS Climatic Impact Committee advised the CIAP study and, following issuance of the CIAP Report, independently issued its findings.

block the sun's rays and have a cooling effect. Second, water vapor in the exhaust, which transmits ultraviolet radiation readily to the surface, tends to absorb infrared radiation, having a warming effect. Third, nitrogen oxides absorb the sun's radiation and have a cooling effect. Finally, the nitrogen oxides tend to reduce the amount of ozone in the atmosphere, and since the ozone also absorbs the sun's radiation, the reduction in the amount of ozone has a warming effect.

The net effect of these four reactions is difficult to predict. It depends in large part on the residence times of the various pollutants, and scientists disagree on this issue. Scientists also disagree on the rate of ozone reduction due to the introduction of nitrogen oxides into the stratosphere. In addition, any prediction is necessarily subject to great uncertainty; partly because of the small magnitude of temperature changes which might be caused by the injection of man-made pollutants, scientists have not been able to produce a comprehensive experiment to corroborate conclusively the theoretical predictions.

Nevertheless, in order to give some idea of the likely magnitude of temperature change, the EIS makes theoretical predictions based on the amount of pollutants emitted by the proposed six daily flights, and by a fleet of 40 Concordes each operated for 20 years. The impact statement estimates that the cooling effect of the sulphur dioxide emitted by six daily flights would be about .00027 degrees Centigrade--less than three ten-thousandths of a degree. The net effect of this plus the other three reactions would reduce the magnitude of even this minimal drop in temperature and perhaps result in a slight warming. For a fleet of 40 Concordes, the EIS shows that, depending on assumptions regarding residence times, the net impact could range from a maximum warming of about .003 degrees to a maximum cooling of about .0024 degrees Centigrade--in neither case more than three one-thousandths of a degree. The CIAP report is qualified by an uncertainty factor of three to ten, but even taking the worst case, the maximum change would be on the order of three one-hundredths of a degree. Beyond that, of course, it is unclear whether a change of this magnitude would be harmful or beneficial to man. I have therefore concluded that the possible effect of the Concorde on the climate is clearly insignificant.

2. Ozone Reduction

A more serious concern than temperature alteration is the claim that the Concorde exhaust will reduce the concentration of ozone in the stratosphere, permitting more ultraviolet radiation to reach the earth's surface and thereby causing an increase in the rate of non-fatal skin cancer.

The ozone layer is a thin concentration of oxygen molecules, each formed from a combination of three oxygen atoms, which permeates the stratosphere and screens out a portion of the sun's ultraviolet radiation which would otherwise reach the surface of the earth. The thickness of the ozone layer in any one location varies widely--variations of ten percent from day to day and of 25 percent over a year are common. The thickness of the ozone layer at the equator is less than half that at the polar latitudes.

Nitrogen oxide in the Concorde exhaust, it is claimed, would reduce the density of this ozone layer. Nitrogen oxide is formed when air containing both nitrogen and oxygen is heated as it passes through the Concorde's engines. The nitrogen oxide combines with ozone in a chemical reaction that breaks down the ozone molecule and produces a new nitrogen oxide molecule, which may then combine with and destroy another ozone molecule, and so on. As the ozone is destroyed, the amount of ultraviolet (uv) radiation which reaches the surface of the earth is increased. A very rough rule of thumb is that in middle latitudes the percentage increase in uv exposure on earth is about twice the percentage decrease in the thickness of the ozone layer.

An increase of certain wavelengths of ultraviolet exposure on earth is very widely thought to increase the incidence of nonmelanomic skin cancer. Scientists lack empirical evidence that would definitely confirm this causal link, but there is relevant circumstantial evidence. Nonmelanomic skin cancer is more common at the equatorial latitudes where the ozone layer is thinnest, and the disease occurs most often on the exposed areas of the bodies of those who spend substantial portions of their lives outdoors. The disease is very rarely fatal, but it can be expensive to treat and may also be disfiguring. As a general rule, the disease occurs only in fair-skinned Caucasians, at a yearly rate of about 240 per hundred thousand in the United States. 45/

45/ Melanomic skin cancer is fatal in about 40 percent of the cases, but the disease is much rarer--less than

The EIS, using data from the CIAP report, calculates that the six flights currently under consideration would reduce the density of the ozone layer by about .04 percent, and this reduction would result in an increase in uv exposure of about .08 percent. The effect of this uv flux on the incidence of skin cancer is of course time dependent--only a prolonged exposure would significantly increase the risk of cancer--but if these calculations are correct, over a 30 year period of continuous operations, the proposed Concorde flights could add an average of around 200 new cases of nonmelanomic skin cancer to the approximately 250,000 already experienced per year in the United States. 46/

There are of course substantial uncertainties in this theory. The CIAP and NAS studies estimate that the accuracy of their results should be qualified by a factor of uncertainty of two to three, which means that the danger could be three times greater, or three times smaller, than indicated in the EIS. In addition, as I noted above, there is no direct evidence that definitely confirms the theory of ozone reduction. Indeed, during the ten years from 1960 to 1970, scientists monitoring the stratosphere at one location recorded a net increase in the total amount of ozone, while

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45/ (Cont'd) ten cases in 100,000 population--and the causal link with exposure to light in the uv band is weak. Melanomic skin cancer commonly occurs, for example, on areas of the body which are not frequently exposed to the sun.

46/ This does not mean that a few years, or even 16 months, of operation would not carry some risk. It would in any event take several years for any possible effect to be felt, but there would be a risk of some (delayed) effect even if the flights were terminated after a year or two. However, that risk would not be on the order of 200 cases for each year of operation: that would require quite a number of years of continuous operation.

The CIAP report estimated that technology could be developed within ten to 15 years to reduce by half the amount of nitrogen oxides in the exhaust, although at a cost of several tens of millions of dollars. NASA has agreed that the technology is possible. Progress in this direction could mitigate the impact of these operations significantly.

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the theoretical models predicted that the injections of pollutants from nuclear explosions in the atmosphere and from elsewhere should have had the opposite effect. 47/

47/ But this observation, while seeming to refute the theory, may have neglected to take into account the long-term natural variability of the solar activity which is the chief source for natural production of ozone. It is impossible to know the exact consequence of man-made pollutants since their effects on ozone are smaller than minimally detectable. Some scientists have also questioned the accuracy of the models themselves. Two major reservations are that the mathematical formulae used in models of ozone reduction may be inaccurate in their representation of the build-up and removal of stratospheric pollutants by atmospheric motion, and that the chemistry--the rate at which chemical reactions occur or the selection of those chemical reactions deemed to be significant--may be incomplete.

The World Meteorological Organization, a U.N. agency, recently concluded that the present and currently-planned SST fleet would not have a significant effect on the ozone layer. It found that:

> "There has already been considerable research conducted into the direct injection of NO_x into the stratosphere by fleets of supersonic aircraft and the consequent effect on the ozone layer. Although there are considerable uncertainties in both measurements and theory (in the latter case being of about a factor of two) the role of NO_x is sufficiently well established to be able to state with reasonable confidence that:
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> - Currently planned SSTs, due to their lower flight altitudes of 17 km and their limited numbers (30-50 projected) are not predicted to have an effect that would be significant or that could be distinguished from natural variations; (Emphasis added.)

Nonetheless, for purposes of making this decision, I cannot ignore the possibility that the six flights proposed by the British and French may result in some increase in the rate of nonmelanomic skin cancer. 48/ It is of course

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47/ (Cont'd)

- a large fleet of supersonic aircraft flying at greater altitudes is predicated to have a noticeable effect on the ozone layer, and permissible total emission levels may have to be defined by international agreement;

- whilst the present numbers and flight altitudes of subsonic aircraft in the stratosphere are not expected to have a significant effect, the trend for each new generation subsonic aircraft to fly at higher levels suggests that this source of NO_x should be closely watched."

Statement of the World Meteorological Organization on Modification of the Ozone Layer Due to Human Activities, Nov. 26, 1975.

48/ It is possible, of course, that banning the Concorde would not reduce the risk of skin cancer. Unlike the noise impact of supersonic flight, which is localized, stratospheric pollution does not respect national boundaries. The EIS concludes that "a comparatively rapid dispersion of stratospheric impurities occurs horizontally on a worldwide basis, so that supersonic aircraft of any nation, flying anywhere, produce similar effects in the hemisphere (northern or southern) in which they fly. High-altitude flights over Europe contaminate the sky over the United States, and vice versa." (EIS, p. VI-107). In other words, whether or not SSTs are permitted to land in the United States, as long as they fly in the northern hemisphere--in Russia, in Europe, to Canada or Japan--the United States population will be affected. By participating in the international SST structure, we should be in a better position to advocate international standards which will protect the world population against any significant risk and to cooperate in the development of emission control technology.

very difficult to balance the danger of non-fatal skin cancer against the benefits of supersonic flight. Particularly troublesome is the fact that the immediate beneficiaries are for the most part not those who must pay the costs. This case is distinguishable from cigarette smoking, sunbathing, and other possibly carcinogenic activities in which the individual voluntarily subjects himself to the risk. 49/

The decision can be put further into perspective by an examination of the relative significance of the ozone reduction caused by SSTs as compared with other sources of increased ultraviolet radiation. The CIAP study found more than 30 possible causes of observable uv flux on the ground, including cosmic radiation, volcanic activity, accumulation of fluorocarbons from aerosol sprays, subsonic aircraft, 50/ nitrogen fertilizer, and nuclear testing in the atmosphere. 51/ Fluorocarbons from aerosol sprays and refrigerants are estimated to cause from 12 to 50 times as much ozone reduction as would the Concorde. 52/

49/ Although the increased risk of non-fatal skin cancer from the proposed Concorde flights may be roughly comparable to moving a few miles south because the uv exposure increases as one moves toward the equator, or to spending several additional minutes at the swimming pool each year, these activities typically are undertaken voluntarily.

50/ The present subsonic fleet includes about 1,700 aircraft that operate in the lower part of the stratosphere. The FAA, using calculations based upon the CIAP study, has predicted that these subsonic aircraft would reduce stratospheric ozone by about [illegible] percent annually, and cause 500 new cases of skin cancer yearly in the United States. EIS Addendum, p. 34. This prediction is of course subject to the same uncertainties as the predictions for Concorde operations.

51/ CIAP Report, p. xxvi.

52/ The impact of fluorocarbons was discussed in the Report of Federal Task Force on Inadvertent Modification of the Stratosphere (IMOS), Fluorocarbons and the Environment (1975). IMOS suggested any federal regulation be delayed until after receipt of the NAS study on the effect of fluorocarbons, due in April, 1976. See also EIS Addendum p. 34.

In spite of these statistics the Consumer Product Safety Commission recently denied petitions to ban these aerosol sprays, based largely on data similar to that before me. 53/ And indeed the United States harbors a number of sources of stratospheric pollution which have the potential for causing far greater increases in the rate of non-fatal skin cancer than the proposed six Concorde flights to the United States, or for that matter than a fleet of 40 Concordes operating worldwide, yet this country has so far failed to act to ban these sources of emissions into the stratosphere. To protect United States interests on the basis of a conclusion that the evidence is insufficient, and yet to ban the Concorde and thereby threaten the enormous European investment in capital and prestige, would, perhaps justifiably, be perceived by our allies in Europe as discriminatory. Such discrepant treatment would be justifiable only to ward off a substantial and immediate danger of harm, and the danger posed by these flights does not, in my opinion, fall into this category. 54/

53/ The Commission found that "the information presently available is insufficient for the Commission to determine the correctness of the hypothesis of ozone depletion..." The Commission further stated that since it "is unable at the present time to determine the probability that any harm will result, it is clearly unable to balance this probability against the economics and other relevant factors..." The Commission was unable to find that aerosol products posed an "unreasonable risk of injury" at this time. 40 Fed. Reg. 36419, 36421 (1975). It reaffirmed its position December 30, 1975, in a case presenting the same issue, Petition No. CP-75-27.

54/ Like the Consumer Product Safety Commission, I retain the flexibility to alter my course if additional scientific evidence makes it advisable. That evidence is badly needed if we are to resolve the difficult problem of determining whether, and to what degree, stratospheric flight may injure us and our environment. Mine is a preliminary assessment of evidence and probabilities, not an ultimate resolution of difficult issues.

D. Noise

I come finally to the Concorde's noise impact, the most significant accurately ascertainable effect of the aircraft. Noise is the factor which has generated by far the greater part of the controversy surrounding the British and French request, and it must be this factor, if any, that compels me to restrict or ban Concorde flights to either of the two airports.

In assessing the nature of the noise impact, I have addressed:

--The nature and effect of the low frequency content of Concorde noise;

--The way in which the noise of the Concorde should be described and compared to that of other aircraft; and

--The effect of Concorde noise on residents of the areas around JFK and Dulles.

1. Low freqency noise

Low frequency components of aircraft noise create community annoyance through induced vibrations of homes and buildings near airports. Because noise generated by the Concorde has a much greater low-frequency content than that of comparable subsonic jets, there has been substantial public concern about the effect of induced vibrations on historic and other buildings, structures, windows and interior furnishings such as pictures, lamps, and dishes. Low frequency sound travels much more readily through the atmosphere and through structures than does the sound produced by other jets. Thus, if the Concorde and a subsonic jet were to generate noise of equal intensity at the aircraft, the Concorde's noise would be of a greater intensity at greater distances from the aircraft, since its sound energy would not dissipate as rapidly. This effect was studied thoroughly by the FAA and is described fully in the final EIS.

In addition to propagating through the atmosphere more readily, the Concorde's noise matches more closely the natural resonant vibrations of man-made structures. Since the noise of the Concorde has five times the low frequency content of the noise of most subsonic jets, the vibrational

effect will be five times as great. 55/ Nevertheless, these vibrations do not present any danger of structural damage and little possibility of annoyance. For brief periods during a Concorde overflight the walls and floor of a building may vibrate slightly, but these vibrations will be barely perceptible. The greatest possibility of annoyance stems from the fact that vibration induced in walls may for a few seconds rattle hanging pictures and dishes and other items which might be standing loose on shelves. Again, however, I emphasize that there is no evidence that structural damage will ensue.

Analysis of historic sites surrounding Dulles, and of St. George's Church in Hempstead, New York, likewise indicated that there was not any danger of structural damage. Indeed, the possibility of any structural deterioration was in most cases far below that which could be reasonably expected from natural deterioration due to the weather. For flights at the proposed level of operation, for example, the annual possibility of cracking plaster at Sully Plantation in Virginia was less than one in ten thousand. The only greater probability of breakage was for already-cracked window panes at Sully Plantation, which could be expected to break once

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55/ Since the initial release of the EIS, the results of vibration measurements near Heathrow and Charles de Gaulle Airports have become available. These measurements indicate that structural vibrations induced by Concorde departures and approaches were only twice (not five times) those induced by conventional subsonic aircraft operated along the same flight paths. These comparisons also indicated that certain subsonic aircraft--specifically, the VC-10 and the Trident--induced greater levels of vibration than those aircraft more common to United States airports such as the B-707 and the DC-8. A comparison of these effects with those of United States aircraft indicates that Concorde-induced structural vibrations are three to three and one-half times those induced by long-range subsonic aircraft. The results lend further support to the conclusion of the EIS that structural vibrations which may be induced by the noise of the Concorde will be well below accepted criteria which would predict no damage, but may be briefly perceptible to building occupants.

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every five years. 56/ Consequently, I have concluded that the vibrational characteristics of the Concorde are not a serious objection to the commencement of operations.

2. Noise descriptors

The EIS analyzes the noise impact of the Concorde. Four noise descriptors are used, each designed to represent a different aspect of the noise impact: FAR 36 measuring points, single-event noise contours, the Noise Exposure Forecast (NEF), and the Aircraft Sound Description System (ASDS).

The FAR 36 measuring points give the noise levels of an aircraft at certain specified points--one under the approach path, one under the takeoff path, and one to the side of the runway at the point of maximum noise during takeoff. The FAR 36 figures do not in general give an accurate picture of total noise impact, but provide a standardized method of measuring aircraft noise for certification purposes.

The single event noise contours, overlaid on maps of the affected areas, yield information about areas of land and numbers of people who will be subjected to noise levels of particular intensities during a single takeoff or landing. This descriptor allows convenient comparison of the geographical extent of the noise impact of different aircraft, such as the Concorde and the Boeing 707, by overlaying the contour of one on the contour of the other.

The Noise Exposure Forecast describes the cumulative noise impact of all the aircraft operating at a given airport during the course of a day. The NEF descriptor includes corrections for irritating whines or discrete frequencies in aircraft noise signatures, and for noises occurring during those periods of the day, such as the late evening, when loud noises are more disturbing. Use of the NEF descriptor permits an assessment of the extent to which Concorde operations will increase the total noise impact on citizens who are already exposed to high levels of noise in airport areas.

The Aircraft Sound Description System also assesses cumulative noise impact, but it places emphasis on the total time of exposure to high noise levels, on the assumption

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56/ Sully Plantation is on the Dulles Airport property and therefore far closer to the runways than any residences.

that loud noises might be more irritating than continual low noises even though the NEF descriptor might show little or no difference in cumulative noise impact. The ASDS figures indicate, through the use of contours, the number of minutes per day that an individual will be exposed to aircraft noise greater than a certain level.

The purpose for which each of these descriptors was established and the particular effect that it is designed to represent should be considered in evaluating the adverse noise impact of limited Concorde operations. In measuring impact on people, the single-event contour is useful because of the unique characteristics of Concorde noise, but the NEF descriptor is more meaningful in measuring the additional impact that residents around these busy airports will in fact experience from either four or two Concorde flights. The FAR 36 measurements, made under standardized conditions, are useful in comparing Concorde noise to that of a subsonic aircraft. The FAR 36 figures could be a consideration in the formulation of an SST noise standard.

At the FAR 36 measuring points, the Concorde is perceived as being approximately half again as loud on takeoff as the B-707, one of the noisiest aircraft in the subsonic fleet, and over twice as loud as the B-747. On approach, the Concorde is quieter than the B-707, but approximately twice as loud as the B-747. 57/

3. Perception of Concorde noise and its impact on people

Noise in urban areas and particularly around airports is a pervasive and serious environmental problem. The best way to predict the noise impact of Concorde, other than through the experience of actual operations, is to examine carefully the maps and single event contours provided with the final EIS. Using each of the four noise descriptors discussed above, the EIS clearly establishes that the Concorde will be noisier than existing subsonic aircraft, save arguably for the B-707 and DC-8 on landing, which are 27 percent of the United States commercial fleet.

57/ Under the standardized procedures specified in FAR 36, aircraft noise is calculated in units of Effective Perceived Noise Level in decibels (EPNdB). This value,

The single event contours illustrate the areas affected by single operations. On the Concorde's takeoff, using noise abatement procedures, for example, 47.6 square miles of land are subjected to noise levels at or above 100 EPNdB; comparable figures for the B-707 and the B-747 are 7.49 square miles and 2.91 square miles, respectively. This level of noise, 100 EPNdB, is approximately equal to, or perhaps slightly less noisy than, heavy city traffic at a distance of 25 feet, although the period of exposure to the

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57/ (Cont'd) which was established as the best representation of human reaction to aircraft noise, factors into the calculation the relative "noisiness" or "annoyance" of an aircraft noise event and the time duration of that event. EPNdB should not be confused with the A-weighted sound level in decibels (dBA), which is commonly used to measure surface transportation and community noise levels. A-weighted sound level applies a single frequency-weighted correction to sound pressure level, and does not include the time factor. There is no constant equivalence between EPNdB and dBA, because of the differences in frequency weightings and time-duration considerations. For the Concorde in level flight at an altitude of about 7,000', the difference is approximately 15 units (i.e., 85 dBA equals 100 EPNdB). The FAR 36 measurement values for the Concorde a[illegible] several subsonic long-range aircraft are cited in p. VI-7-8 of the EIS.

	Concorde	B-707-300	B-747-200
Takeoff	119.5 EPNdB	113 EPNdB	107 EPNdB
Sideline	112.0	102	98
Approach	116.5	118	106

An increase of ten EPNdB represents an approximate doubling of the perceived loudness of aircraft noise. The noise levels are not additive. Two noise sources simultaneously producing 100 EPNdB do not combine to produce 200 EPNdB. In fact, the increase in noise would barely be perceptible to the human ear.

the aircraft noise would be short, generally under a minute. 58/ On a Concorde approach, 11.1 square miles of land are subjected to noise levels at or above 100 EPNdB whereas comparable figures for the B-707 and B-747 are 2.47 square miles and 0.59 square miles, respectively.

The NEF contours indicate the additional effect of limited Concorde operations on the cumulative noise impact around JFK and Dulles. Around JFK in 1978, the EIS projects that 485,000 people will reside within the NEF 30 contour and 112,000 within the NEF 40 contour. If four Concorde flights are added to that projection, 487,000 people will reside within the NEF 30 contour and 114,000 within the NEF 40 contour. 59/ Thus, approximately 2,000 additional people could come within each contour area around JFK, an increase of 0.4 percent within the NEF 30 area and about two percent within NEF 40, as the result of the proposed Concorde operations. All 487,000 residents would be exposed to slightly greater total noise exposure (roughly 0.3 NEF units). Thus, at JFK, an already severely affected area would be further degraded, but relatively little compared to the existing levels of noise exposure.

Around Dulles, the population is relatively sparse. The EIS projects that less than 1,000 residents will be included within the NEF 30 contour around Dulles in 1978, and no residents will be included within the NEF 40 contour. The addition of the proposed two Concorde daily flights at Dulles would not greatly increase the number of people within either of these contours, although four additional square miles would be included in the NEF 30

58/ The EIS included single event noise contours for 100 and 110 EPNdB noise levels. There is no generally accepted standard by which community reaction may be predicted for a particular level of noise; however, some surveys indicate that a single-event level of aircraft noise of 90 EPNdB is "acceptable" for repeated exposures. Other surveys indicate that, for infrequent events, a peak level of 100 EPNdB is acceptable. These conclusions, however, are not unanimously accepted.

59/ Using the NEF concept of community reaction to aircraft noise exposure, the following interpretations of NEF values have been generally accepted:

contour and less than one additional square mile in the NEF 40 contour. On the basis of the NEF data, the effect of the proposed Concorde operations at Dulles will be hardly perceptible. 60/

It is left to me to translate these data into a form that can help guide the decision which I make today. This is no easy task. The noise analysis is quite complete, and yet it gives me no clear direction. The cumulative noise descriptor shows that the increase in the number of people who live in the NEF 30 area at JFK would constitute substantially less than one percent of those currently exposed to NEF 30. At the same time, the cumulative noise figures show that hundreds of thousands of people would find that they lived in a somewhat noisier environment. The single event contours indicate that the Concorde is a

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59/ (Cont'd)

Less than NEF 30	Essentially no complaints expected; noise may interfere with community activities.
NEF 30 to NEF 40	Individuals may complain; group action possible.
Greater than NEF 40	Repeated vigorous complaints expected; group action probable.
NEF 45	Threshold of possible hearing loss after daily exposure over 40-year period, assuming eight-hour outdoor exposure with the other 16 hours away from area or inside building with at least 15-decibel sound attenuation. Potential hearing loss is barely measurable and only in less than 4 percent of the exposed population at NEF 45.

60/ The above comparisons assume that no additional noise abatement measures are taken to reduce the extensive aircraft noise problem. If additional noise abatement measures prove practicable, the comparisons of incremental Concorde noise impact will alter. If, for example, all subsonic turbojet aircraft over 75,000 pounds were retrofitted with sound absorbent material, the noise comparisons would change.

great deal louder than most existing subsonic transports, yet the Concorde will conduct only four flights--eight operations--per day into JFK, out of a current daily average total of nearly one thousand operations at that airport. 61/

Perhaps even more significantly, the noise data provide me with only a descriptive and statistical view of the noise impact. Noise is not an objective experience; people do not agree on how objectionable a given sound may be. Noise is a source of great irritation to some, but of little to others. People may react more intensely to Concorde noise than they would to another new and equally loud source, merely because of the controversy which has surrounded the introduction of that aircraft.

60/ (Cont'd) If retrofit were implemented completely in 1978 (technologically impossible but useful for comparison) the Concorde EIS projected that only 252,000 people would reside within the NEF 30 contour around JFK, and only 30,000 within the NEF 40 contour, a substantial reduction from the "no-retrofit" situation. The proposed addition of four Concorde flights would then result in 261,000 residents within NEF 30 and 30,000 residents within NEF 40 contours. Nine thousand additional people would come within the NEF 30 area around JFK, as the result of the proposed Concorde operations, and all 261,000 residents would be exposed to somewhat greater total noise exposure (roughly 1.0 NEF units). Thus, although the cumulative noise around JFK with the retrofit of subsonic jets, even with the addition of Concorde, would be substantially less than it is now without Concorde, the additional impact of four Concorde flights would be greater than it would be without retrofit.

61/ To clarify the context in which we are operating, I might note that an air carrier could, without amending its operations specifications, increase the total noise around an airport more than it will be increased by the proposed Concorde flights simply by adding a few extra flights by, say, B-707s or DC-8s.

The EIS indicates to me that the marginal impact of six additional flights would be small. Given the subjective nature of human response to noise, however, I must conclude that if any flights at all are justified--that is, if there is sufficient affirmative reason for permitting Concorde flights that we are willing to suffer some environmental effect--those flights should be authorized only on a temporary basis, in order to permit a more intelligent and responsible decision to be made at some point in the future, after we have collected information on the subjective response to Concorde during actual operations.

IV. CONCORDE'S BENEFITS

A. Technological Benefits

The most obvious and immediate benefit of scheduled commercial Concorde operations will be the reduction in travel time between the United States and Europe. Travel times in subsonic jets between New York and London, for example, are now in the vicinity of seven hours; the Concorde can make the trip in half that time. Initially, businesspeople will probably be the primary beneficiaries of this time reduction, though some tourists will certainly benefit, too. But time may be more critical to the businessperson; speedier travel will reduce the amount of wasted time spent in airplanes, and it will allow businesspeople to fly to Europe (or the United States), conduct their business, and return much sooner than if required to travel by subsonic jets. The Concorde will also mitigate the effects of jet lag, to the extent that jet lag is caused by fatigue as well as time zone differentials.

In the long run, if the Concorde proves to be a viable technological innovation and more efficient aircraft are developed, the number of persons who benefit directly from supersonic commercial service will increase. Since time as well as cost is a deterrent to travel, the Concorde may actually generate new transatlantic air traffic which otherwise would never have flown at all.

These benefits are admittedly somewhat speculative at this stage in the development of commercial supersonic aircraft, but it is undeniable that if the adverse environmental impacts are controlled in a cost-efficient way, the SST will be a substantial transportation improvement, with significant benefits for commerce, trade, cultural exchange, and leisure. The introduction of jet service was accompanied by considerable controversy, even though it preceded the enactment of the National Environmental Policy Act and the general environmental awareness of the late 60's and early 70's. Nonetheless, jets cut travel time in half, and the result has been the virtually complete replacement of the long distance commercial propeller-driven fleet with subsonic jet aircraft, and an enormous increase in air travel from 10.2 billion revenue passenger miles in 1950 to 162.9 billion revenue passenger miles in 1974, an almost 16-fold increase. 62/

62/ U.S. Bureau of the Census, Statistical Abstract of the United States: 1975 (Chart 992), p. 591.

There is of course substantial question whether this same revolution in travel is achievable with supersonic aircraft. The environmental characteristics of the Concorde are such that supersonic operations with existing equipment on a massive scale would not be desirable, regardless of the substantial time savings; and the extent to which the Concorde can be cleaned up and quieted down is unknown. The marketability of supersonic travel at compensatory fares is also uncertain. Neither of these questions can be resolved, however, if we refuse to permit even temporary operations into this country to demonstrate the aircraft's capabilities.

The introduction of jet aircraft into commercial service was, as I noted above, accompanied by a storm of protest over the noisiness of the engines. Since that time, however, technological advances have produced engines that are far quieter and cleaner than those of the earlier jets. Similar technological advances are believed possible with the SST. Attempts to muffle the sound of the engines currently used by the Concorde have been unsuccessful, but additional research may lead to a means of producing quieter yet sufficiently powerful engines. The reduction of harmful emissions, particularly nitrogen oxides, is a real possibility within the next 15 years, and that technology may be applicable to the engine currently in use.

The improvements in the noise characteristics of subsonic jets were possible only because the jet could successfully compete with propeller-driven aircraft. The commercial success of the jet encouraged manufacturers to underwrite research programs which led to the development of aircraft like the DC-10 and the B-747-200, and to the capability to retrofit older, noisier jets. This leads me to the second major unknown--whether the manufacturers of Concorde, either through commercial success or the demonstration of commercial potential, will be able to support or encourage the kind of research program which will be necessary to develop a cleaner, quieter second-generation supersonic transport. Only through actual operations will the nature of the demand for supersonic travel become clear. 63/ If the Concorde can compete, or if Concorde operations demonstrate that a more efficient, larger capacity SST could compete, then the British and

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63/ In a letter dated December 24, 1975, submitted for the record, the Acting Administrator of the National Aeronautics and Space Administration stated:

"On balance, my view is that there are important reasons why limited Concorde operations should be

French, and perhaps the Americans, might be encouraged to undertake the research effort necessary to develop a profitable and environmentally more acceptable aircraft. The vision I outlined above might then become a reality, and the importance of that kind of revolution in transportation can scarcely be overstated.

63/ (Cont'd)

favorably considered. Very important to me is the fact that limited operations would allow this country to have the opportunity to observe, at first hand, the technical and operational aspects of supersonic transport operation within a real air transportation system environment. This opportunity, furthermore, requires no long range commitments on our part. Only from actual operational data can proper conclusions of economic and environmental impact be correctly assessed and future projections made. Informed judgments in many areas are needed to help guide this country's future decisions not only for future operational use of SST's but, possibly even more importantly, whether and when the U.S. should embark on an advanced supersonic transport development.

"It further seems clear to me that acceptance of Concorde limited operations can have a very supportive effect on our aircraft industry. Acceptance would be viewed as a vote of confidence in the future, while rejection at this time could put a damper on efforts to develop the technological base for a future economically viable and environmentally acceptable advanced U.S. built SST. In this connection, I would like to remind you that the results of our research programs to date, which address the difficult technology issues for such an SST, have been quite encouraging. We are beginning to see ways that noise might be reduced to present FAR 36 levels or even lower, for vehicles capable of 4000 n.m. range, having fuel consumption approaching that of the narrow body jets, and with direct operating charges low enough to reduce fare surcharges to one-sixth those anticipated for Concorde. The engine of these aircraft would meet all emission requirements in the airport environs now anticipated, and would limit the emissions of NO_x in the stratosphere to eliminate the issue of ozone depletion as a consideration."

B. International Relations

International aviation as we know it today--the reciprocity of rights and privileges and the widespread exporting and importing of aircraft--is possible only through adherence to a complicated network of treaties and international agreements. Unlike domestic law, treaties and international agreements--because they are not subject to enforcement by any international police power or to the moral suasion of a homogenous culture--are delicate and fragile instruments. Their efficacy is dependent upon the good faith of the parties and upon the recognition of a greater self-interest that is attained only through long-term international cooperation. If provisions of international law are strictly construed or applied in new situations only to further some immediate self-interest, the entire fabric of international law is weakened. Obviously, even where a nation acts according to fair and nondiscriminatory motives, it must take care as well to avoid the appearance of unfairness or discrimination.

The Concorde represents a 13 year commitment of almost three billion dollars by the British and French governments, who are among our closest allies and our best customers of United States goods. Prestige, economic vitality, and employment stability are at stake. Service to the United States on the lucrative North Atlantic market was from the first a substantial element in the Concorde program, and denying the aircraft landing rights in this country could well abort the program. The United States must therefore be very careful, in the interests of our relations with England and France and of the continuation of the free and open use of the established international airways, to be wholly fair and nondiscriminatory in making this decision, and to take into account the fact that the decision may in any event be perceived as being unfair and discriminatory.

Although I believe, to the extent one can ever fairly judge one's own actions, that whatever decision I might have made today would have been fairly motivated, a decision totally to deny the Concorde landing rights might easily have been perceived as discriminatory for two reasons. First, the United States would be open to the charge that we treated our own aircraft more favorably than those of foreign countries in regulating aircraft noise. The statutes and historical pattern of aircraft noise regulation, and indeed of most environmental regulation in this country,

demonstrate that the promulgation of noise standards has closely followed the development of feasible technology to control noise. FAR 36 was promulgated over a decade after the advent of commercial jet aviation, and 80 percent of the planes in service today still do not satisfy its standard. The regulation was initially written to exempt temporarily aircraft certificated before 1969, which could not comply, and was amended to cover new versions of those aircraft only after the technology became available. 64/ The Federal Aviation Act specifically requires the Administrator of the FAA to consider technological feasibility in promulgating regulations. All feasible steps have been taken to control the Concorde noise, and it cannot be modified further to abate the noise levels. Consequently, if we refused to let the Concorde land for noise reasons, the British and the French might well be justified in feeling that the Concorde had been given harsher treatment than we gave our own jets.

Second, the British and French might justifiably feel that the United States was discriminating in its attitude toward stratospheric pollution. There is some risk that even a few Concorde flights may reduce by a slight amount the ozone layer, and that this may cause an increase in the incidence of non-fatal skin cancer. But this is admittedly only speculation. Only recently the United States Consumer Product Safety Commission has denied petitions to initiate rulemaking to ban fluorocarbons, even though the evidence presented would have indicated that the impact of fluorocarbons on the ozone is substantially greater than that of the Concorde. The United States cradles other significant potential sources of stratospheric pollution--military aircraft operations, fertilizers, the space shuttle program--and unless the United States is willing to act against these sources as well, action against the Concorde could well be perceived as discriminatory.

Apart from appearance of discrimination, the British and French might perceive in a negative decision an unfair element of surprise, a defeat of justifiable reliance. No promises have been made to the British or French. However, the United States has never promulgated a noise standard applicable to SSTs. In February, 1975, the EPA proposed several alternatives, and expressed a preference for the option that would have exempted the first 16 Concordes manufactured and permitted them to land at federally

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64/ See note 26 supra.

designated airports with approval of the proprietors under specified restrictions. A total ban at this point might well be perceived by our allies as the imposition of a penalty for which they were not given notice. It is true that we would be applying NEPA, but that Act provides little in the way of definite standards which might have put the British and the French on clear notice of precise limits of the amount of noise pollution the United States was willing to tolerate.

Finally, the British and French might well feel that the United States had taken advantage of the benefits of the relatively free and open international aviation structure while being unwilling to pay the costs. The United States has been the chief beneficiary of the agreements and treaties that permit international use of aircraft based on the airworthiness certificate of the manufacturing country. Almost 95 percent of the commercial and general aviation jet aircraft that have been sold in the free world in the last five or six years have been made in this country. Last year, we exported 2.7 billion dollars in aircraft and aeronautical components--second only to agricultural products in helping to maintain a favorable balance of trade. United States air carriers and aircraft have facilitated commerce throughout the world, opened up new markets for United States products, and created a great many jobs at home. The United States has also been the chief beneficiary of the absence of noise regulations in other nations, for our aircraft--noisy aircraft such as the Boeing 707 and the DC-8--have been welcomed in the great majority of countries in this world, and have been sold to other countries when our air carriers replaced them with newer, quieter jets. 65/ A negative decision could well defeat the British and French effort to enlarge their share of the international aeronautical industry. In view of the history of United States dominance of the aviation industry, it would be quite remarkable if such a decision were not considered to be unfair.

65/ Despite substantial public conern over noise, British and French approvals for the Boeing 707 were given after only brief demonstrations. Initial tests and demonstrations for noise were accomplished in London and Paris in September, 1958. Pan American began service to Paris from New York in October and to London from New York in November. In both cases, restrictions as to time of operation and gross take-off weight were imposed.

CONCLUSIONS

In reviewing the environmental costs of six daily Concorde flights, I have concluded, on the basis of currently available information, that the impact on air quality, the effect of low frequency noise vibrations and the climatic impact of stratospheric emissions are not significant reasons for denying limited operations.

Although we cannot predict accurately the relative fuel efficiency of the Concorde in commercial service, I am troubled by the probability that it will be significantly less efficient than the subsonics. This is a factor I have considered under NEPA, but it is not grounds for denying United States operations. To do so would be inconsistent with United States energy policy which seeks to improve fuel efficiency where technologically feasible, but does not bar the operation of transportation modes because there are relatively more efficient alternatives available. Nor would it be appropriate to initiate such a policy by dictating to other countries how they should allocate their fuel resources. In any event, the total fuel consumption of six flights a day is not substantial when measured against total fuel consumption for transportation. 66/

The theory of ozone reduction and the associated increase in nonmelanomic skin cancer are, of course, of concern. But there is genuine dissent at each point in the causal chain--the chemical reaction, the relative ozone reduction, and the inducement of skin cancer. I have accepted the theory nonetheless, even though it is not conclusively established and there is not any accepted way of measuring the impact of a few flights. Proper caution requires that I heed the conclusions of the CIAP and NAS studies, albeit with due recognition of the reservations and qualifications expressed therein. I have concluded, however, that although there might be some slight risk of additional non-fatal skin

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66/ In addition, most of the fuel will be British or French. If it becomes necessary for the United States to allocate aviation fuel in the future, the allocation for the British and French carriers could be discounted by the difference between the Concorde's requirements and those of subsonic jets.

cancer from a limited number of flights over a period of 30 years, that risk is not sufficient to warrant preventing a 16 month demonstration, the stratospheric impact of which would be miniscule. During this period there will be the opportunity to undertake additional tests and measurements, to seek additional scientific consensus at international conferences already scheduled or proposed, and to conduct the FAA-sponsored High Altitude Pollution Program. If additional knowledge makes it advisable to discontinue stratospheric flights, there will be time to make that decision. In the interim, we must face the fact that there are other United States-manufactured releases into the stratosphere that unquestionably have a substantially greater adverse impact than the limited Concorde flights. To take action against the Concorde while failing to halt these other releases might well be perceived as unfair.

The most serious immediate consequence of limited Concorde operations is noise. The Concorde is noisier than the subsonic jets, particularly on takeoff, although the limited flights under consideration will have a negligible impact on total aircraft noise exposure at Dulles and only a marginally incremental impact at JFK. But at a time of heightened environmental consciousness, any additional noise is a serious adverse consequence. The unique characteristics of Concorde noise and the publicity that has surrounded its advent may well aggravate the community's response to this source of noise. This subjective characteristic of noise response may best be evaluated through a controlled demonstration period of sufficient length to enable an assessment, after the initial publicity has subsided, of community reaction to Concorde noise. A demonstration will also enable additional testing at various measuring points to supplement the data contained in the EIS. The information from this demonstration will enable us to determine whether these original Concordes should be permitted to operate into designated United States airports in accordance with specified operating procedures and restrictions. It will also provide useful information in the review and evaluation of the EPA's latest proposal for an SST noise standard, although consideration of that standard will not be delayed until the completion of this demonstration but will proceed with deliberate speed. Although I am deeply concerned about the additional irritation that these few demonstration flights may cause for some individuals within the NEF 30 and 40 contours surrounding JFK and Dulles Airports, I believe that this environmental cost is outweighed by the benefits that will accrue to the American people from the demonstration.

Although, with the exception of noise, I do not consider the environmental consequences of these limited Concorde flights to be substantial, I nevertheless consider this a difficult and close decision. It is difficult because the benefits cannot be easily quantified and depend in such large measure upon speculation and my obviously limited ability to predict the future. There are, of course, some tangible benefits. The Concorde will significantly increase the speed with which travellers can cross the Atlantic. This will facilitate international commerce and trade and cultural exchange. In addition, extension to the Concorde of the opportunity to prove itself will be an expression of international cooperation and good will between the United States and two of our closest allies with whom we share a substantial cultural heritage. It will help assure our allies that we seek to act without discrimination and fairly and equitably in our economic relations with them. It will be an important reaffirmation of the mutual reciprocity that has enabled the United States to benefit so substantially from the export of its aeronautical products for the past 30 years.

I am fully cognizant of the fact that a complete bar of the Concorde would be a popular and widely acclaimed course of action, particularly by environmentalists and by the citizens in many of the areas surrounding the airports. Perhaps I would even be depicted by the press, however mistakenly, as the man who stood up to some undefined but sinister pressure to let the Concorde in--however absent such "pressure" has in fact been. But I have struggled to discount such considerations and searched instead for a better sense of historical perspective from which to resolve my dilemma. I have also recognized that my absolute denial of the British and French applications would likely be the final chapter in the saga of United States involvement with the Concorde. Limited approval would, in all probability, not be so conclusive, leaving the opportunity not simply for further executive assessment--and I have structured my decision so as to make that mandatory within 16 months--but also for the scrutiny by the people in the United States and other agencies of the Government.

These and several other considerations have helped impel me toward the conclusion that a demonstration period is appropriate. One is history, which teaches that the

benefits of new technologies are not always readily apparent at the time they are introduced. At various points in our history, if we had not acted with foresight we would never have seen the development of the steamboat, the railroad, or the automobile. The advent of the jets was accompanied by substantial debate and public apprehension. Any new technology brings with it a certain degree of risk and a substantial amount of public concern. But the technological innovation that requires tolerance at its inception also enables control of its environmental consequences. I have enough confidence in this nation's environmental commitment and in the objective judgment of the market place to be sure that if the SST does in fact become the aircraft of the future, it will only be because man will have developed the technology to meet environmental standards and to enable the SST to compete in the market place effectively. But if we bar the Concorde completely, we may well be condemning for all time or delaying for decades what might be a very significant technological advance for mankind.

The adverse consequences of a limited and controlled demonstration are worth the benefit that would accrue to the American people from observing first hand the commercial application of this technology. It will enable us to evaluate whether the SST is commercially viable, whether the consumer is willing to pay the additional cost for the reduced travel time, the extent to which fatigue and jet lag are reduced and the advantages for international commerce.

It will also permit further assessment of the environmental impact, measuring noise levels during actual commercial operations, evaluating subjective community response to the Concorde's unique noise characteristics, determining relative fuel efficiency per passenger mile, monitoring air pollution, and enabling stratospheric testing. The information derived from this demonstration will be invaluable in determining how the technology might be developed to control adverse environmental effects and what United States and international environmental standards are appropriate for the SST. Participation in the international SST route structure will also give the United States a more meaningful role in the international standard development process, particularly concerning the stratosphere.

A 16 month demonstration period will be sufficiently long to evaluate the variables of seasonality, to help justify the initial commercial investment, to test consumer and community response, and to provide both the European

governments and United States private industry the opportunity to consider whether the development of cleaner, quieter, more fuel-efficient SST technology is a sound capital investment.

It may well be that further development of this technology is not economically sensible in the energy and environmentally conscious period in which we live. If so, then the Concorde will fail because it is an anachronism, and its failure will be recognized as such rather than attributed to an arbitrary and protectionist attitude of the United States out of fear that our dominance of the world aeronautical manufacturing market is threatened.

Thus, I have concluded that the benefits of an environmentally sound, commercially viable SST would be substantial. I am also convinced that we do not yet have sufficient information upon which to make a judgment about whether such an aircraft could be developed. Given the substantial effort by the French and British to initiate this technology, and the fact that United States participation may well be essential to the commercial success of the SST, I believe this demonstration is needed to determine whether a commitment to this new technology should be embraced.

Accordingly, I hereby order the Federal Aviation Administrator to issue on March 4, 1976, 67/ an order provisionally amending the operations specifications of British Airways and Air France, as described and subject to the terms and conditions set forth on pages 3 and 4 above.

February 4, 1976

William T. Coleman, Jr.
William T. Coleman, Jr.
Secretary of Transportation
Washington, D.C.

67/ A 30-day delay in taking a proposed action from the date a final environmental impact statement is filed with the Council on Environmental Quality and distributed to commenters is required by paragraph 9.g of Department of Transportation Order 5610.1B, Procedures for Considering Environmental Impacts, which implements NEPA and follows the CEQ Guidelines, 40 C.F.R. §1500.11(b).

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APPENDIX I

SECRETARY OF TRANSPORTATION'S COMMENTS ON SAFETY

As my discussion of legal considerations indicates, this decision is essentially in two parts. The first part is whether the Concorde may be operated safely within the airspace and the air traffic control system of the United States. The second is whether as a matter of public policy the Concorde should be permitted to land in the United States.

Consistent with the provisions of the Department of Transportation Act of 1966, which transferred back to the Federal Aviation Administrator functions relating to safety, I have left the first part of this decision solely to the FAA Administrator. I have asked that the FAA fully explicate the reasons for its decision, but I have independently analyzed the facts and I agree with the FAA's conclusions respecting safety. The Administrator's conclusions are set forth in Appendix II. Nonetheless, the safety question has generated some public concern, and I feel that it is appropriate to respond briefly to some of the major points that have been raised, particularly those issues that under this country's treaty obligations are within the FAA's jurisdiction to assess in deciding whether to amend the operations specifications of a foreign air carrier. The FAA has not independently analyzed the safety of the Concorde with respect to those issues upon which we are required by treaty to recognize the certification of the British and French aviation safety authorities, but obviously it has not accepted judgments that have no support.

The Professional Air Traffic Controllers Organization, in a statement submitted for the public docket in conjunction with the January 5 hearing, raised the two points which have perhaps been the subject of most discussion: whether the Concorde has adequate range to complete the Paris to Dulles route, and whether the aircraft will be able to operate safely in the FAA's air traffic control system.

The EIS, on page IV-4, describes the Concorde's flight/fuel profile in relation to operational range, based on a maximum gross take off weight of 400,000 pounds, as follows:

Category	Weight in Pounds
Operating weight empty	175,000
Payload	25,000
Block fuel	160,000
Fuel for flight variations	10,000
(Longer airways)	
(Strong headwinds)	
(Longer holding)	
Diversion fuel	9,000
Holding fuel	13,000
(30 minutes)	
Reserve	8,000
	400,000

The EIS also states, at page IV-4, that:

> "[i]n September 1973, Concorde flew from Dulles to Paris, taking off with a total weight of 385,000 pounds, 25,000 pounds of which was payload, and arriving in Paris with fuel reserves of 24,000 pounds.
>
> "When the term 'operational range' was used in the draft EIS some readers apparently confused it with a concept of absolute range or maximum range possible. If the flight profile were changed so that the Concorde after takeoff would climb to 46,000 feet subsonically, transition to supersonic speed and then descend to land at its destination airport after slowing to subsonic speed, the absolute range of the Concorde with a full payload would be 5,000 statute miles."

The distance from London to Dulles is 3,665 statute miles and from Paris to Dulles is 3,838 statute miles (EIS, pp. IV-3).

The FAA has determined that the fuel reserve requirements of the British and French airworthiness authorities are more stringent that the United States fuel reserve requirement applicable to aircraft owned and operated into the United States by both American and foreign air carriers. That regulation, Federal Aviation Regulation 91.23, requires that any person operating a civil aircraft in IFR (Instrument Flight Rules) conditions must carry enough fuel to:

"(a) Complete the flight to the first airport of intended landing;

"(b) Fly from that airport to the alternate airport; and

"(c) Fly thereafter for 45 minutes at normal cruising speed."

The regulation does not specify the alternate or the altitude or the weight at which the aircraft cruises for the 45 minutes. The Concorde would require approximately 4,600 lbs. of fuel to divert to an alternative airport, and 16,000 lbs. to fly for 45 minutes at Mach 0.93, at 38,000 feet at a gross weight of 230,000 lbs. at the beginning of the diversion from Dulles. Thus the total reserves required by FAR 91.23 are 20,600 lbs. of fuel. The British and French aviation authorities, on the other hand, will require the Concorde to carry 30,000 lbs. of reserve fuel over and above the block fuel (the amount of fuel necessary to complete an uneventful flight from takeoff through landing) and fuel to compensate for possible enroute contingencies such as unexpected headwinds. Thus the Concorde will be carrying fuel reserves more than adequate to meet the requirements of FAR 91.23.

I should point out that the United States has additional fuel reserve requirements, set forth in FAR Part 121, that are applicable to aircraft being issued a United States type certificate by the FAA. These requirements are not applicable to the Concorde other than for certification purposes, and the United States is bound by treaty to accept the determination of the British and French that the Concorde meets the fuel requirements necessary for certification in those countries.

The second issue raised by PATCO is whether the Concorde can be operated safely within the confines of the air traffic control system, an issue it is rightly concerned about in view of its members' responsibilities in this area. The FAA has thoroughly studied this problem for some time, beginning in 1972 when it became clear that the British and French would eventually request permission to fly the Concorde into the United States, and has concluded that the development of special or unique air traffic procedures and special handling would not be necessary. In particular, Concorde's greater speed was determined to present no special problems as long as air traffic controllers were aware of it, since the controllers currently handle aircraft of widely varying speeds in a single control system.

In addition, several of the flight parameters of the Concorde that have been perceived by commentators, particularly an official of the FAA Eastern Region in his response to the draft EIS, as operating requirements, are in fact merely procedures which would allow the Concorde to operate more efficiently. They are not essential and immutable operating characteristics of the aircraft. For example, the Concorde operates more efficiently at higher altitudes, and if the aircraft is allowed to hold prior to landing at altitudes higher than the 14,000 foot ceiling imposed on subsonic jets, the Concorde will be less expensive to operate because it will use less fuel. The FAA whenever possible will allow the Concorde to hold at these higher altitudes, just as it does for other high performance jets operating into and out of some United States airports. The Concorde is, however, perfectly capable of holding the same patterns at the same speeds and altitudes as subsonic jets, and will be required to do so if for any reason holding patterns would interfere with other air traffic.

The other major concern about safety that is within the FAA's jurisdiction is the ability of the Concorde to execute the left turn off of Runway 31 Left at JFK, which will be necessary to comply with the Port Authority's noise regulations. The FAA has carefully examined the flight characteristics of the Concorde. The aircraft utilizes a sophisticated inertial navigation system which provides a precise source of altitude information for the pilot's flight instruments. The pilot can precisely control the flight path through the use of this system, substantially reducing the pilot's workload during takeoff. In addition, the Concorde has excellent stability and handling qualities, due in part to the superior response of the delta wing

configuration in turbulence and the very high thrust level on takeoff. This combination of flight characteristics enables the pilot to execute the proposed turn easily and safely. This has been verified in actual operations in the Concorde itself, flown by an expert FAA pilot and the Director of the Flight Standards Service of the FAA, both of whom agreed that the manuever is quite safe.

The remaining safety issues--explosive decompression, cosmic radiation, explosion suppression in the fuel tanks, and temperature and wind shear, are issues upon which the United States is bound by treaty to accept the judgment of the British and French aviation authorities. The FAA has nonetheless examined these issues, and, while making no formal determination, is confident that the aircraft meets all relevant safety standards for supersonic aircraft flying today.

APPENDIX II

THE FEDERAL AVIATION ADMINISTRATOR'S SAFETY CONCLUSIONS

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

URGENT

DATE: JAN 14 1976

WASHINGTON, D.C. 20591

IN REPLY REFER TO:

SUBJECT: Concorde Safety Issues

CONTROL NO. 31134 SIRS S-10

FROM: Administrator

OFFICE OF THE ADMINISTRATOR

TO: The Secretary

As requested in your memorandum of January 7, enclosed is FAA's analysis of Concorde safety issues which have been raised, including those discussed at your public hearing on January 5.

There are two separate FAA actions that affect the Concorde. The most immediate is the amendment of British Airways and Air France's operations specifications to allow limited operations of the Concorde in the United States. A second prospective action is the issuance of a U.S. type certificate to the manufacturers (British Aircraft Corporation and Aerospatiale) of the Concorde. To clarify the respective actions and distinguish between them, I would like to offer a brief summary of some terminology and its application.

A type certificate covers the design, construction, performance, and stability of an aircraft. This certificate assures that an aircraft meets the minimum airworthiness standards of the issuing authority. In the United States, that is the role of the Federal Aviation Administration (FAA). Our respective counterparts are the British Civil Aviation Authority (CAA) and the French Secretary General for Civil Aviation (SGAC). Only one type certificate is issued for a given aircraft type design.

An airworthiness certificate is issued for each aircraft produced under a type certificate, and it basically ensures that the aircraft is a copy of the one evaluated in issuing the type certificate. It is important to note two points:

1. Our International Agreements with England and France apply only to aircraft type and airworthiness certificates.

2. Type or airworthiness certificates do not authorize aircraft operation in the United States.

Operations specifications, the basic applicable regulations which govern foreign air carrier operation to the United States, are contained in FAR 129 which require any foreign air carrier operating any aircraft within the United States to carry current registration and airworthiness certificates issued or validated by the country of registry and to obey the air traffic rules and operating procedures when operating in the United States.

A certificate of airworthiness has been issued to the Concorde by the responsible aviation authorities of the Republic of France and the United Kingdom. By issuance of the airworthiness certificate, the aviation authorities of France and England have certified that the Concorde meets or exceeds the minimum international airworthiness standards established by Annex 8 of the International Civil Aviation Organization (ICAO). Article 33 of the Convention on International Civil Aviation (Chicago Convention) provides that:

> Certificates of airworthiness...issued or rendered valid by the contractual state in which the aircraft is registered, shall be recognized as valid by the other contracting states, provided that the requirements under which such certificates... were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

The United States, France and England are contracting States to the Chicago Convention. The proposed operation of the Concorde would be by British Airways and Air France, the flag carriers of their respective countries where the Concorde will be registered.

There exist Bilateral Air Transport Agreements between the United States and the Republic of France and the United States and the United Kingdom. Article 4 of the Bilateral Agreements provides:

> Certificates of airworthiness...issued or rendered valid by one Contracting Party and still in force shall be recognized as valid by the other Contracting Party for the purpose of operation of the agreed services.

Article 11 of the Chicago Convention and Article 5 of the Bilateral Air Transport Agreements between the United States on the one hand and England and France on the other basically provide that the laws and regulations related to the operation and navigation of aircraft engaged in international air navigation shall be applied in a nondiscriminatory manner in each country.

These provisions do not establish or grant a right to conduct commercial transportation. The provisions of Article 11 of the Chicago Convention and Article 5 of the Bilateral Transport Agreements provide that each nation shall have the right to control such operations and navigation within its own territory provided that it does so in a nondiscriminatory manner. This right to control the operational and navigation activities that occur within the territory of a nation is independent of and distinct from the recognition of the validity of certificates of airworthiness.

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The purpose of the foregoing is to distinguish between those safety issues which are our responsibility to evaluate and those which are covered by existing international agreements with the British and French. Basically, the international agreements establish that safety issues related to airworthiness are the responsibility of the British and French. As to the issuance of amended operations specifications to British Airways and Air France, given the issuance of an airworthiness certificate to the Concorde by the civil aviation authorities of England and France, safety findings are the responsibility of the British and French Governments.

In conclusion, the Concorde has been determined by the British and French certification authorities to be a safe airplane design in accordance with ICAO standards. It has also been determined to be safe by the states of manufacture through their issuance of type and airworthiness certificates. Therefore, as a foreign designed and built aircraft, it has satisfied all airworthiness requirements under existing agreements to permit its operation into the United States. Since the aircraft meets international standards and those of the states of manufacture, it can be categorized as a safe aircraft.

The FAA has not completed action upon the request for the issuance of a U.S. type certificate to the manufacturers of the Concorde. There are areas where FAA safety standards may be higher than international standards or the states of manufacture. Before a U.S. type certificate is issued it will meet all applicable FAA safety standards.

Enclosed hereto are separate analyses of the various safety issues which have been identified:

1. Fuel Reserves
2. Safety of the Departure Turn From Runway 31 Left at JFK
3. Cosmic Radiation
4. Air Traffic Procedures and Response to Eastern Region Comments
5. Explosive Decompression
6. Installation of a Fuel Tank Nitrogen Inerting System
7. Temperature Shear
8. Wind Shear

John McLucas

John L. McLucas
Administrator

Enclosures

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Form DOT F 1320.1 (1-67)

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

DATE: January 7, 1976

In reply refer to:

ACTION
is assigned to:
CONTROL NO.
30879
SIRS S-10

SUBJECT: Safety Recommendations

FROM : The Secretary

TO : Federal Aviation Administrator

I am requesting you, pursuant to your authority under Title VI of the Federal Aviation Act of 1958, as amended, to submit to me a memorandum providing your conclusions concerning the safety of the Concorde SST.

I would appreciate your review of all the information relating to safety that was presented at the public hearing on January 5th and of all of the submissions filed with this office and the FAA by the January 13th deadline.

This document should include an analysis of the safety issues that have been raised and evaluated within the FAA and have been raised through the public hearing process. It would be helpful if you would distinguish between those issues which are our responsibility under the FAA Act and under Article 5 of the U.K.-U.S.A. Bilateral Agreement and Article 5 of the U.S.-France Bilateral Agreement and those issues which are covered by the British and French airworthiness certificates that we are obligated to recognize under the fourth article of each agreement.

May I have your findings by January 16.

William T. Coleman, Jr.

CERTIFIED TRUE COPY

ISSUE: FUEL RESERVES

Article 11 of the Chicago Convention and Article 5 of the Bilateral Air Transport Agreements between the United States on one hand and the British and French on the other provide that the laws and regulations of each contracting party relating to the entry into or departure from its territory applicable to the operation and navigation of aircraft engaged in international air navigation while within the territory of each contracting state are applicable. The basic operating regulations applicable to foreign air carriers are set out in Part 91 of the Federal Aviation Regulations. Other regulations applicable to foreign air carriers include those established by Part 129 and the pertinent air traffic regulations.

Finding of Fact:

Flight Standards Service of the FAA has determined that fuel reserve standards required by the airworthiness authorities of Britain and France for Concorde are more stringent than the only U.S. fuel reserve requirement (FAR 91.23), which would be applicable to a Concorde being operated by a foreign air carrier.

This regulation requires, among other things, that:

"No person may operate a civil aircraft in IFR conditions unless it carries enough fuel (considering weather reports and forecasts, and weather conditions) to-

(a) Complete the flight to the first airport of intended landing;

ISSUE: SAFETY OF THE DEPARTURE TURN FROM RUNWAY 31 LEFT AT JFK

It is FAA's opinion that an FAA determination of the safety of this maneuver is not required by any treaty or other international agreement between the U.S.-U.K. and the U.S.-France. The safety of the maneuver is not an airworthiness matter. All air traffic which takes off from runway 31 Left at JFK follows a track in which requires a left turn away from populated areas. Concorde will follow this standard air traffic routing. Because of the Congressional and public concern over the safety of the Concorde maneuver in following this flight track and at the request of the Port of Authority of New York, the Administrator directed that Flight Standards Service make a determination as to the safety of the proposed takeoff procedure.

Finding of Fact:

The FAA has concluded that this maneuver is safe. This conclusion is based on a qualitative evaluation conducted by two representatives of the FAA Flight Standards Service and a retired senior Pan American captain acting in the capacity as consultant to FAA. This evaluation included flying the proposed maneuver in both a simulator and in the Concorde itself.

Discussion:

The Concorde utilizes a very sophisticated inertial navigation system which also provides a precise source of attitude information for the pilot's flight instruments. This allows pitch attitude to be used as a primary means of precise flight path control for takeoff and a reduction in pilot workload.

(b) Fly from that airport to the alternate airport; and

(c) Fly thereafter for 45 minutes at normal cruising speed."

For the purposes of this discussion, reserves are considered to be (b) and (c) above.

The regulation does not specify which alternate, or at what altitude or weight to fly for 45 minutes at normal cruising speed. The operator may select optimum conditions. The regulation also does not specify fuel levels required to descend or land.

To comply with this regulation, Concorde would require approximately 4,600 lbs of fuel to divert to an alternate, and 16,000 lbs to fly for 45 minutes at a Mach Number of 0.93, at 38,000foot altitude and a gross weight of 230,000 pounds at the beginning of the diversion (over Dulles). The total reserves required under FAR 91.23 are approximately 20,600 lbs. To comply with the British and French reserve standards, the Concorde will be required to carry approximately 30,000 lbs of fuel.

The Concorde has excellent stability and handling qualities. The response of a delta wing configuration in turbulence is much better than a classical swept wing configuration. Because of the high thrust required to cruise supersonically, the Concorde has a large thrust to weight ratio at takeoff and, therefore, very high performance compared to subsonic aircraft.

The workload requirement is relatively low during the takeoff and initial climb. The aircraft geometry is such that the aircraft can be rotated to the desired pitch attitude prior to lift-off from the runway. Proper rotation techniques result in the aircraft being stabilized approximately 30 to 50 feet above the runway. There is time to commence a turn at 100 feet above the runway. There are no additional routine actions required by the crew such as raising or moving aircraft flaps since the Concorde has no flaps.

Should an emergency situation occur during takeoff or while in the turn, procedures have developed to roll the wings level and climb straight ahead, which is an added safety margin.

Variations in piloting technique in performing the maneuver will probably be in the initiation of the turn at a higher altitude or using a lesser bank angle. This will not compromise safety. Adequate flight crew procedures have been developed for emergency situations.

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ISSUE: COSMIC RADIATION

To the best of our knowledge, neither the U.S. or France has airworthiness or operating rules relating to cosmic radiation. The U.S. has none. ICAO in its Circular 126-AN/91 (copy attached) have offered guidance material on SST aircraft operations on this subject.

Statement of Fact

The manufacturers have informed us that Concorde crews are provided instrumentation to detect cosmic radiation and procedures have been developed to avoid exposure to it. This is discussed in detail on pages VI-139 and -140 of the final EIS. Concorde appears to comply with the recommended procedures outlined in the ICAO guidance material.

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ICAO CIRCULAR

CIRCULAR 126-AN/91

1975

GUIDANCE MATERIAL ON SST AIRCRAFT OPERATIONS

Approved by the Secretary General and published under his authority

INTERNATIONAL CIVIL AVIATION ORGANIZATION
MONTREAL • CANADA

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CHAPTER 7 - SOLAR COSMIC RADIATION

7.1 In-Flight Procedures

Information which will enable the pilot to determine the best course of action to take in the event of exposure to solar cosmic radiation and related procedures should be included in the Operations Manual. The following is an example of the scope and type of such information:

a) when the pilot of an aircraft intended to be operated above 15 000 m (49 000 ft) receives an indication of a total radiation dose rate of 10 mrem/h, he should alert the appropriate ATS unit to the possible need for a change in flight level;

b) when the total radiation dose rate reaches 50 mrem/h, the pilot shall request clearance to descend to an acceptable flight level (where the total radiation dose will be not greater than that to which the occupants of a subsonic aircraft on the same route could be expected to be exposed) and should descend upon receipt of clearance to do so;

c) when the onset of solar cosmic radiation interrupts air-ground communications, and the dose rate being received is considered unacceptable, the situation should be treated as an emergency and the appropriate ATS unit advised, as soon as possible, of the action taken;

Note 1: Guidance on the change of radiation with height is given in Figure 31.

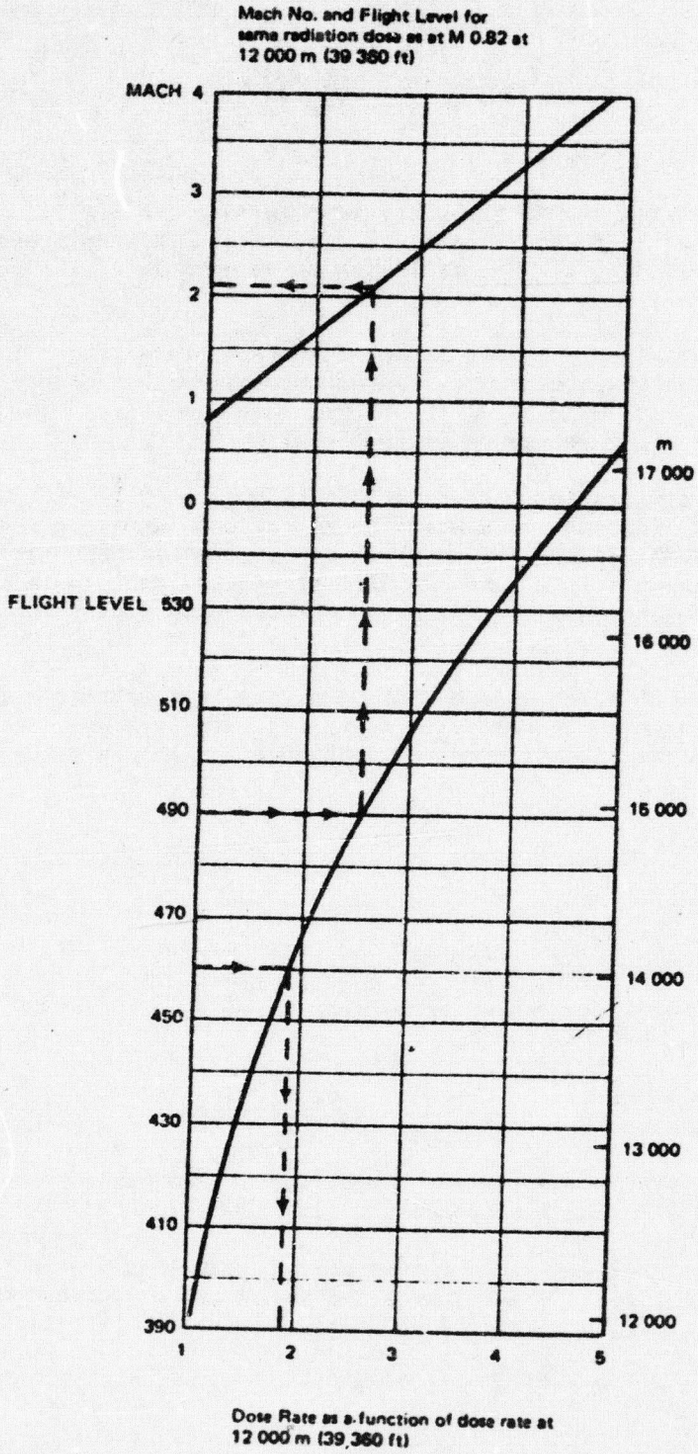
Note 2: It is not considered that the risk associated with a dose rate in excess of 50 mrem/h justifies an emergency uncleared descent to or through a flight level occupied by any underflying aircraft.

d) A practical example of the use of Figure 31 for one specific type of aircraft the Concorde, is as follows:

1) it is required to determine limitations to be placed on Concorde operations during a solar cosmic radiation event;

2) from Figure 31, it will be seen that flight at approximately FL 490 requires operation at M 2.1 (or more) to achieve the same (or less) radiation dose as a subsonic aircraft flying at FL 390 at M 0.82. M 2.1 is too fast for Concorde at FL 490, therefore a lower flight level must be chosen; and

3) the highest flight level for Concorde operations during a solar cosmic radiation event is FL 480 provided M_{mo} is maintained. Other lower suitable flight levels and speeds are:



Examples

1. At 15 000 m (FL 490) aircraft flying at M 2.1 have same dose per unit distance as at M 0.82 at 12 000 m (39 360 ft).
2. At 14 000 m (FL 460) dose rate is 1.9 times that at 12 000 m (39 360 ft).

Figure 31. CHANGE OF RADIATION WITH HEIGHT

ISSUE: AIR TRAFFIC PROCEDURES AND RESPONSE TO EASTERN REGION COMMENTS

Article II of the Chicago Convention and Article 5 of the Bilateral Air Transport Agreements between the U.S. and the U.K. and France provides that the laws and regulations of each contracting party relating to the entry into or departure from its territories and the operation and navigation of aircraft engaged in international air navigation while within the territory of each contracting state are applicable. We have evaluated the Concorde's ability to comply with existive air traffic procedures while operating in U.S. airspace.

Finding of Fact

The Air Traffic Service of the Federal Aviation Administration, for the past several years actively has participated in extensive planning for operations of commercial supersonic aircraft. This work has taken place in close coordination with other FAA and governmental interests concerned. Our counterparts in Canada, France and the U.K., the aircraft manufacturers, the airline operators and pilots, the FAA Eastern and New England Regional Offices and the affected terminal and en route air traffic control facilities also have been involved in this planning. Additionally, the Air Traffic Service routinely provides advisory service to the ICAO SST Panel and the ICAO North Atlantic Systems Planning Group in their operational and technical deliberations on this matter.

Detailed operational planning intensified during the 1972-75 time period when a series of route development meetings were held with all concerned parties.

This work culminated in the establishment of proposed arrival and departure routes and altitude profiles to support operations to/from the JFK and Dulles Airports. These routes, which are outlined in detail within the enclosed minutes of July 7-8, 1975, meeting plan for Concorde operations within the continental limits of the U.S. in a manner essentially identical to those routes/altitudes regularly being flown by subsonic aircraft operating to/from either terminal in North Atlantic operations.

Since this aircraft, if Concorde operations are approved, will essentially operate within the U.S. in a manner consistent with the current subsonic jet fleet, a review of existing air traffic control procedures was conducted on an international level within the ICAO SST Panel and the ICAO North Atlantic Systems Planning Group and by the various FAA Headquarters, regional and facility elements concerned. The results of this work indicated that no "special handling" or priority treatment would be necessary and that initial operations of the Concorde can fit into the existing air traffic control system. Our limited operational experiences of flights made within the U.S. to date (Boston, Washington, Miami, Dallas/Fort Worth, Los Angeles, San Francisco, Moses Lake, Anchorage, Fairbanks and Bangor) corroborate this conclusion. Our planning activities have paralleled similar work which was required and performed in the mid and late 1950's to support the then impending introduction into operational service of subsonic civil jet aircraft.

Finally, we recognize that the Concorde, along with other high performance aircraft currently flying within the ATC system, has certain technical characteristics and desired operational parameters which, to

provide for optimum economic operation, are different than other types of aircraft. These characteristics include higher rates of climb and descent, particularly in the transonic phases, and the desire to operate at higher speeds in terminal arrival/departure phases. These characteristics will require a high level of awareness by air traffic controllers and more precise advance planning than that required for other aircraft. Such higher levels of awareness should not, however, be interpreted to mean that priority treatment or "special handling" need be given to the SST which would impose penalties upon other airspace users. Rather, the controller will endeavor to satisfy these operational desires whenever traffic conditions permit.

The balance of this paper responds to the five points raised in AEA-4's letter of May 2, 1975, to AFS-1 commenting on the Draft Concorde Environmental Impact Statement. The five points were related to the provision of air traffic service to the Concorde. It should be understood that the AEA-4 comments were made following receipt of a briefing by British Aircraft Corporation personnel who probably presented the aircraft's characteristics and desired flight parameters as firm operational requirements. Our planning for accommodation of the SST in the U.S. air traffic control system has taken into consideration the operational requirements established by the ICAO SST Panel as well as the desired aspects of its operation.

Item 1 - During the transonic acceleration/deceleration phases the controller will have to assign Concorde blocks of vertical airspace between FL 250 and 430. If a controller wishes to stop descent or climb during this phase, he must allow approximately 5,000 feet vertical lead time in order for the pilot to comply with a clearance.

Response - The first sentence of the statement is technically inaccurate. Transonic deceleration will commence from top of cruise (approximately FL 580) and will be completed between FL 450 and FL 390 depending upon aircraft weight and existing meteorological conditions. The aircraft will, therefore, be operating in a subsonic mode at flight levels which essentially "top" those normally flown by subsonic aircraft. Transonic acceleration ideally starts between FL 250 and FL 300. The aircraft will fly routes and altitude profiles similar to subsonic aircraft up to the point at which transonic acceleration starts.

The aircraft can be "leveled off" at intermediate levels during either phase if unanticipated traffic conditions warrant such action; however, clearances authorizing transonic climb or descent should not be issued until traffic conditions appear to permit an unrestricted operation to the end of either phase. The controller must be alerted to the generally faster climb/descent rates of the Concorde during both phases, as he must be to other high performance aircraft currently being provided with air traffic services, and plan his "lead times" and altitude utilization accordingly.

Reference - Panel Report of 5th Meeting, page 10.5(i)
ICAO Circular 126 AN/91, Page 12, paragraph 2.5.1.2

Item 2 - When operating at supersonic cruise altitudes, Concorde must be provided with a floating band of altitudes (in effect a cruise climb/descent) between FL 430 and approximately FL 580. This characteristic would eliminate the use of vertical separation between supersonic aircraft flying the same or crossing routes.

Response - The cruise/climb mode of operation while in supersonic flight is the most cost efficient method of operation for an SST. It was recognized by the ICAO SST Panel as the first order of preference for en route supersonic operation. The desired band of levels while operating in this mode is between FL 500 and FL 580, not between FL 430 and FL 580 as stated by AEA-4. (Cruise/climb is generally defined as beginning when rates of climb/descent have diminished to rates of 50 feet per minute or less).

It is not true to state that this "eliminates the use of vertical separation between supersonic aircraft flying the same or crossing courses." If necessary, SSTs can be cleared to maintain a constant flight level in the supersonic phase until conflicting traffic is no longer a factor and a reclearance can be issued to resume flight in the cruise/climb mode. To reiterate, the SST would prefer to operate in this mode; it does not have to. Clearances would be issued authorizing flight in this mode on a traffic permitting basis. If traffic densities at the affected flight levels increase significantly, clearances at constant flight levels will become the norm.

Reference - Panel Report of the 5th Meeting, page 10-5(f)
Circular 126 AN/91, page 14, paragraph 2.6.2

Item 3 - It has not yet been established to FAA's satisfaction that the Concorde can hold within present protected holding airspace areas above 14,000 feet. Therefore, special holding procedures and criteria would have to be developed to insure separation from other aircraft.

Response - The U.S. is satisfied that the Concorde could hold using the same procedures (speeds/bank angles) as current subsonics and thereby stay within protected holding airspace areas above 14,000 feet, but this

would be uneconomical due to the higher fuel consumption. Therefore, the SST Panel stated an operational requirement for the SST to hold at 280 KTS above 14,000 feet and 250 KTSat and below 14,000. These speeds are 40 - 50 KTS greater than the speeds used by subsonics. The U.S. air traffic facilities, in response to the request, would, whenever possible, accommodate the higher holding speeds for the SST by applying the appropriate holding pattern airspace areas currently established for other aircraft with similar high performance characteristics.

Reference - Panel Report of the 5th Meeting, page 10-6(v)
Circular 126 AN/91, page 17, paragraph 2.8.3

Item 4 - Procedural changes may be necessary in order to accommodate the higher arrival/departure speeds of the Concorde if they are sequenced behind subsonic turbojets.

Response - This is not an operational requirement. Again, for purposes of fuel conservation, controllers would be advised of the desired higher speeds in terminal area maneuvering and apply the same techniques that are used today for subsonic jet aircraft that are sequenced behind slower aircraft. In the intermediate approach area (vectoring), the desired speed of the Concorde will be about 230 knots, reducing to 200 knots at start of final and then to 160 knots at runway threshold. This represents a speed differential of 20 - 30 knots between the Concorde and subsonic jet aircraft. This simplifies the spacing of subsonic aircraft behind a Concorde. To reiterate, Concorde operations will not require any change to those procedures currently established and applied today when similar speed differentials are encountered. The Concorde operating at speeds 20 - 30 knots faster than preceding subsonic jet

aircraft will be controlled in a manner identical to that applied between light general aviation aircraft followed by subsonic turbojets.

Reference - Circular 126 AN/91, page 18, paragraph 2.9.2

Item 5 - The Concorde is exceptionally fuel critical. Special procedures must be set up if delays of 30 minutes or more are expected at destination airport. These procedures would have to include relaying anticipated delay information to the operator prior to scheduled departure.

Response - Fuel consumption is critical to all aircraft. But, the Concorde will meet all regulatory fuel requirements. The SST Panel did state an operational requirement for an "SST to be informed of expected terminal delay sufficiently early before intended descent to permit absorption of such delay by the most economical means". Before intended descent does not mean prior to scheduled departure. The Panel also stated a requirement "That ATS be capable of authorizing SST aircraft to absorb the whole or part of notified terminal delay by descending early and cruising at a reduced speed for the latter portion of the flight and of crediting the aircraft with the time absorbed when determining the landing order." The first requirement is not new - all operators are generally advised when terminal delays are being experienced. The second requirement is a technique which would provide fuel management flexibility to Concorde operators. To the extent that it is possible, U.S. air traffic control facilities will accommodate these requirements.

Reference - Panel Report of the 5th Meeting, page 10-5(h) and page 10-6(g)
Circular 126 AN/91, page 17, paragraph 2.8.1 and 2.8.2

Appendix A

FLIGHT PLANNING DETAILS FOR CONCORDE OPERATIONS SERVING THE J. F. KENNEDY AND DULLES INTERNATIONAL AIRPORTS

DULLES INTERNATIONAL AIRPORT

Arrival Route

SST Oceanic Track at cruise/climb FL 540-580 direct to 4430N 6000W at FL 540-580 direct to 4054N 6955W at FL 540-580 direct to 4027N 7230W descending to cross this point at FL 520 direct to Robbinsville (RBV) VORTAC crossing RBV at FL 390 direct to Modena (MXE) VORTAC crossing MXE at FL 220 thence via V474 V143S crossing the New York/Washington ARTCC boundary at 14,000 feet to Westminster (EMI) VORTAC crossing EMI at 10,000 feet direct to Frederick (FDK) VOR crossing FDK at 6,000 feet to Dulles.

Departure Route (via Shads)

Dulles radar vectors to the Lisbon (7LM) Intersection thence V44 to the Swan Point (7NP) Intersection climbing to FL 230 crossing 6 NM west of Baltimare (BAL) VORTAC at or above 12,000 feet BAL V44 to Swan Point (7NP) Intersection direct Kenton (ENO) VORTAC crossing at FL 230 direct Sea Isle (SIE) VORTAC at FL 230 direct Shads Intersection climbing to cross Shads at FL 400 or above direct 3950N 6900W climbing to cruise/climb at FL 550-590 direct 4309N 6000W cruise/climb at FL 550-590 thence SST Oceanic Track to destination.

NOTE: Although either Dulles departure option; i.e., Shads or Tunna would be acceptable for flight planning purposes, it is suggested that the aircraft operators indicate their primary operational preference.

J. F. KENNEDY INTERNATIONAL AIRPORT

Arrival Route

SST Oceanic Track at cruise/climb of FL 540-580 direct to 4430N 6000W direct to the Hyannis (HYA) VORTAC crossing the Boston/Moncton boundary with descent/deceleration clearance to cross HYA at FL 390 thence Suffolk Arrival (STAR) Route to JFK crossing the New York/Boston boundary at FL 260 crossing the Hampton (HTO) VORTAC at FL 200 crossing the Bohemia (7QM) Intersection at a cleared level of either 8,000 or 11,000 feet.

Departure Route

JFK Sardi Standard Instrument Departure (SID) with Nantucket transition climbing to cross Nantucket (ACK) at FL 250 thence climbing direct to the Codds Intersection direct to 4039 6000W thence via the SST Oceanic Track to destination at cruise/climb FL 550-590.

ISSUE: EXPLOSIVE DECOMPRESSION

The protection of the aircraft, passengers, and crew against explosive decompression is a design and airworthiness matter which the British and French airworthiness authorities have evaluated and approved. The U.S. recognizes the validity of the certificate of airworthiness issued by the British and French pursuant to Article 33 of the Chicago Convention and Article 4 of the Bilateral Air Transport Agreements.

Finding of Fact:

Although the FAA is required to accept the British and French finding, on this issue we have evaluated the explosive decompression issue because of the comments received. This evaluation was conducted in light of the application for U.S. type certification of the Concorde and against the criteria contained in Attachment A. Attachment A is a special condition issued pursuant to 14 CFR 21.17 and contains the requirements which the Concorde design must meet prior to issuance of a U.S. type certificate. Under the terms of the U.S.-U.K. and U.S.-French Bilaterial Airworthiness Agreements, the U.S., prior to issuing a type certificate, may prescribe any regulations or special conditions applicable to a foreign design, and approve the means of complying with these rules. The French and British will make the technical finding of compliance with our regulations and special conditions.

The British, French and U.S. are in agreement that the passenger safety level for any type of new aircraft development must not be less than that previously accepted. During the initial Concorde design, all known

high altitude risks were considered. The solution to the explosive decompression issue was to build the Concorde to more rigid structural requirements than any present subsonic transport aircraft. The effect of this solution is to decrease the probability of decompression to an acceptable level. Under these standards, it is highly improbable that the cabin altitude will ever exceed 37,000 feet and if it should ever reach this level, it can be lowered to 15,000 feet within 7 and one-half minutes. Thus, passenger safety will be commensurate with that of present-day aircraft. An example of these more stringent standards are the small passenger windows on the Concorde. Should a window blow out at cruise altitude, the resulting hole would be such that the pressure leak rate would permit the Concorde to make an emergency descent and the cabin altitude would never go above 37,000 feet. Conventional drop-down masks are provided the passengers and they provide adequate oxygen for cabin altitudes of approximately 40,000 feet. This is the same system found in current subsonic aircraft. Above 40,000 feet cabin altitude pressure breathing apparatuses are required to provide adequate oxygen. As an added safety feature, the crew is provided with the pressure breathing equipment to assure no interference with their ability to perform their duties in the event of pressurization loss. It should be stressed, however, that the Concorde cabin altitude is never expected to go above 40,000 feet.

Discussion:

The Concorde has been designed in accordance with the philosophy that all new aircraft have a level of safety equal to or greater than that previously accepted. Therefore, the possibility of explosive decompression is not a significant safety issue.

A-54 Pressurized cabins.

In addition to the requirements of § 25.841, the following apply:

(a) In § 25.841(b)(1), the parenthetical phrase reading "at least one of which is the normal regulating valve", is deleted.

(b) The cabin pressurization system must be designed to maintain the the following failure-cabin altitude-time relationships:

(1) Cabin altitude-time history must not exceed that shown in Figure 5 after each of the following:

(i) Any double failure in the pressurization system.

(ii) Any single failure in the pressurization system combined with a 12-inch-long skin puncture, or with a complete loss of a door seal element.

(2) Cabin altitude-time history must not exceed that shown in Figure 6 after each of the following:

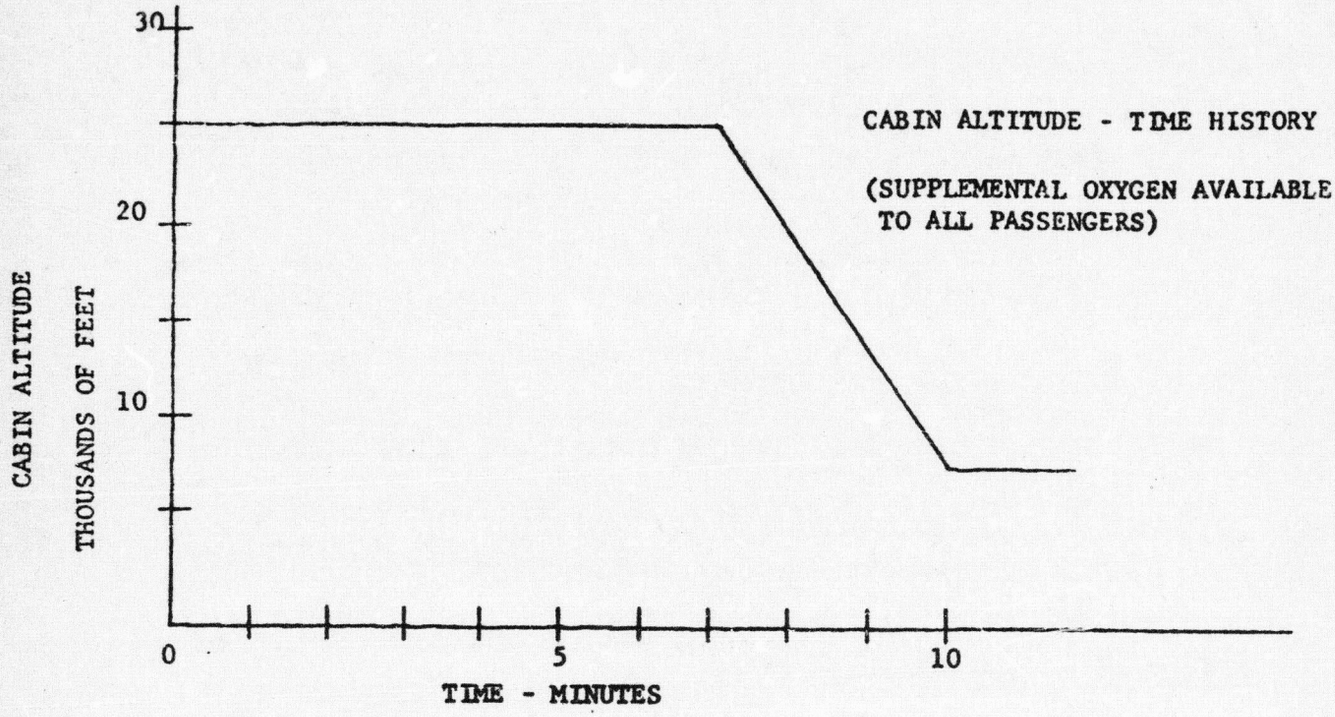
(i) Complete loss of a typical skin panel as bounded by the crack stopper pattern, unless it is shown by tests that the maximum opening resulting from crack propagation is less than that of the panel.

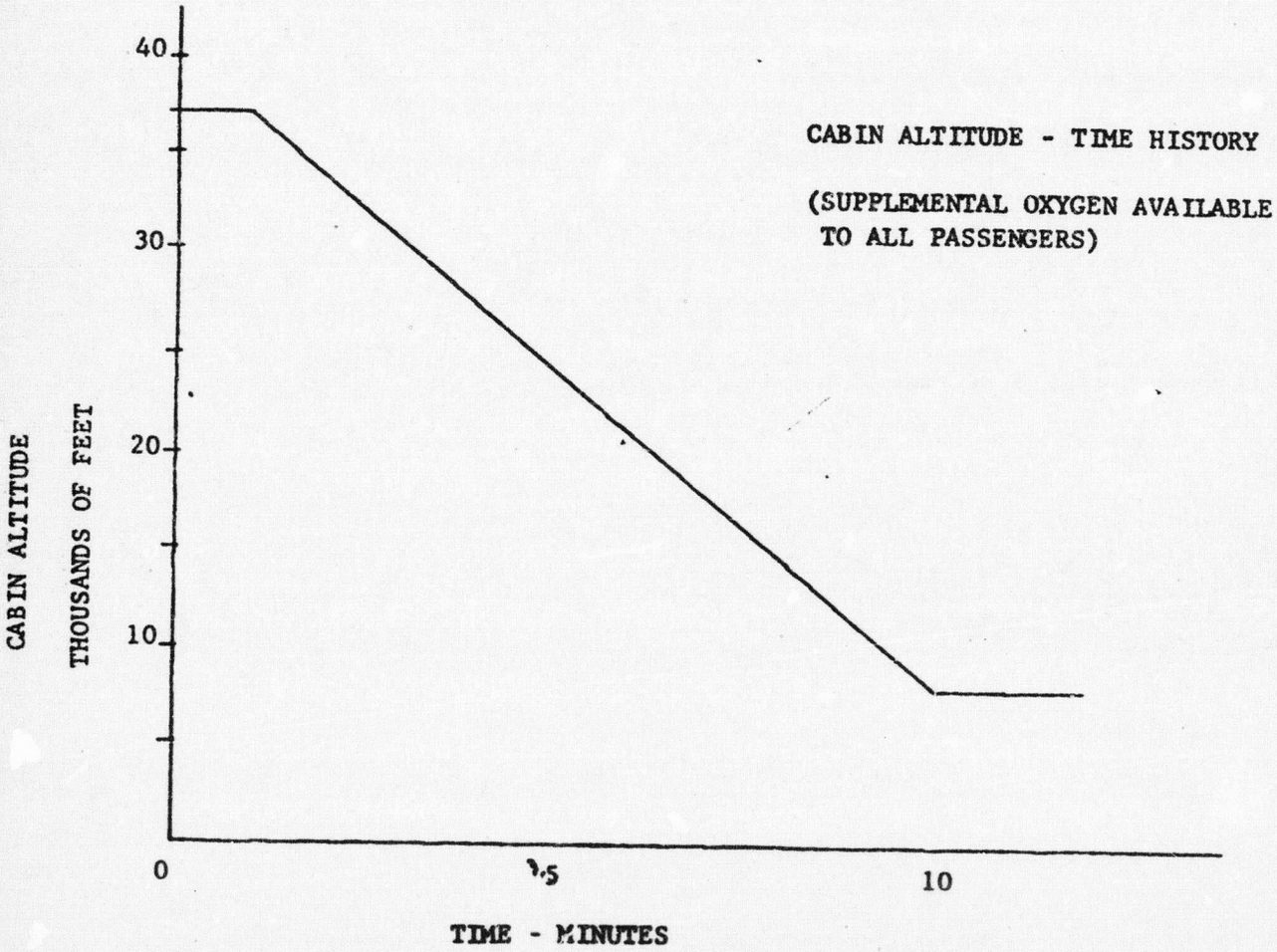
(ii) Complete loss of a cabin window.

(iii) Penetration by a large segment of an engine turbine or compressor disc unless it is shown that engine disintegration will not result in a puncture of the pressure vessel.

(iv) Any other critical opening in the pressure vessel resulting from damage based on a rational analysis, on experience, and on tests of the configuration under consideration.

FOR EACH FIGURE, TIME STARTS AT THE MOMENT CABIN ALTITUDE EXCEEDS 8,000 FEET DURING DEPRESSURIZATION. AREAS WHEREIN THE ACTUAL CABIN ALTITUDE - TIME HISTORY FALLS BELOW THE CURVE MAY BE USED TO COMPENSATE, BY INTEGRATION, FOR AREAS WHEREIN THE ACTUAL CABIN ALTITUDE - TIME HISTORY REASONABLY EXCEEDS THE CURVE. TIME IS CONCLUDED WHEN CABIN ALTITUDE RETURNS TO 8,000 FEET.


CABIN ALTITUDE - TIME HISTORY
(SUPPLEMENTAL OXYGEN AVAILABLE TO ALL PASSENGERS)
CABIN ALTITUDE
THOUSANDS OF FEET
30
20
10
0
5
10
TIME - MINUTES


CABIN ALTITUDE - TIME HISTORY
(SUPPLEMENTAL OXYGEN AVAILABLE TO ALL PASSENGERS)
CABIN ALTITUDE
THOUSANDS OF FEET
40
30
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5
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TIME - MINUTES

ISSUE: INSTALLATION OF A FUEL TANK NITROGEN INERTING SYSTEM

The protection of aircraft, passengers and crew against the hazards of a fuel tank fire is a design and airworthiness matter which the British and French airworthiness authorities have evaluated and approved. The U.S. recognizes the validity of the certificate of airworthiness issued by the British and French pursuant to Article 33 of the Chicago Convention and Article 4 of the Bilateral Air Transport Agreement.

Findings of Fact

A nitrogen inerting system is one means of providing for the protection of the fuel system against fire. It appears at this time that a nitrogen inerting system will not be installed on the Concorde. The manufacturers of the Concorde are developing an alternative means to protect the fuel system against fire which will provide a level of safety equivalent to that of current subsonic aircraft. The FAA has not completed its evaluation of methods to provide for the protection of the fuel system against fire.

Discussion

In connection with a request for a United States type certificate for the Concorde, a special condition was issued on January 16, 1970, which requires "a means to prevent or suppress fire and explosion within the fuel tanks and venting systems in the presence of an ignition source." The objective is to maintain the level of safety now provided for subsonic jet aircraft and to cope with the unique features of the Concorde design, specifically elevating fuel temperatures and close-to-fuel tank

relationship. Several different methods of compliance are available such as nitrogen inerting, flame arresting, or explosion suppression. The manufacturers of the Concorde have indicated their intention to comply with this special condition using an alternative method consisting of a program of special tests and demonstrations to prove freedom from accidental ignition sources which might cause fuel tank explosions. Evaluation of this alternative method has not been completed by the FAA.

FAA has been informed that the British and French airworthiness authorities did not consider the Concorde fuel system design to have any unique features or any undue safety problem which would require specially designed preventive systems. In their opinion, the Concorde fuel system was, from a safety standpoint, equivalent to that of currently operating subsonic aircraft. Should the U.S. not accept the manufacturers proposed alternative means of compliance with the special conditions and conclude that additional methods are required for fuel tank fire protection, it does not mean that the design is unsafe as approved by the British and French. It would mean that our safety standards in this case would be higher than the British and French airworthiness standards.

ISSUE: TEMPERATURE SHEAR

The issue of high altitude temperature shear is a design and airworthiness matter which the British and French Airworthiness Authorities have evaluated during flight tests leading to the issuance of all airworthiness certificates. The U.S. recognizes the validity of the certificates of airworthiness issued by the British and French pursuant to Article 33 of the Chicago Convention and Article 4 of the Bilateral Air Transport Agreements.

Finding of Fact

During flight testing by the British Airworthiness Authorities prior to issuance of the British original airworthiness certificate (type certificate) a potential problem was discovered during supersonic cruise in the Tropics. The Concorde engine thrust is very sensitive to air temperature and when the aircraft was cruising on autopilot, if it encountered a rapid temperature gradient it would accelerate and climb or decelerate and descend. A crew procedure was developed whereby the pilot would over ride the autopilot and the difficulty has been eliminated.

ISSUE: WIND SHEAR

Wind shear is a rapid change of wind speed and direction which affect all aircraft. The most critical area is aircraft controllability near the ground during the takeoff or landing phase of flight.

To the best of our knowledge, neither Britain nor France have regulations governing the basic airworthiness of aircraft when encountering wind shear. The only regulations where wind shear is considered are in the approval of automatic landing systems. The U.S. recognizes the validity of the certificate of airworthiness issued by the British and French pursuant to Article 33 of the Chicago Convention and Article 4 of the bilateral air transport agreements.

Finding of Facts

The FAA has not specifically evaluated, or approved or disapproved, Concorde or any other aircraft in wind shear conditions.

There are technical reasons why wind shear should have less effect on Concorde than on currently operating subsonic aircraft. These include the inherently higher stability of a delta wing configuration in turbulence, lower wind loading, higher acceleration capabilities.

OPINION OF JUDGE POLLACK, DATED MAY 11, 1977 - Pg. 149-181

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY; WILLIAM J. ROMAN; W. PAUL STILLMAN; JAMES G. HELLMUTH; VICTOR R. YANITELLI; MILTON A. GILBERT; JAMES C. KELLOGG, III; ALAN SAGNER; JOSEPH F. CULLMAN, III; JANE ENGELHARDT; LEWIS L. GLUCKSMAN; ROBERT F. WAGNER; Commissioners of the Port Authority of New York and New Jersey, and HOWARD SCHULMAN, Commissioner Designate of the Port Authority of New York and New Jersey,

Defendants.

76 Civ. 1276(MP)

DECISION

APPEARANCES:

A. PARTIES

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and

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MILTON POLLACK, District Judge.

Milton Pollack, District Judge.

The British Airways Board and Compagnie Nationale Air France, plaintiffs herein, have brought a declaratory judgment and injunction suit against The Port Authority of New York and New Jersey ("PA" hereafter) and its Commissioners, named as defendants, to declare invalid the PA's resolution of March 11, 1976. That resolution denies permission to the plaintiffs, until further action of the PA Board, to engage in experimental test flights of the Concorde, to and from John F. Kennedy International Airport (JFK) located on Long Island, New York.

The plaintiffs claim that the PA resolution offends relevant international treaties and agreements, and illegally invades an area of regulation which has been generally preempted by the federal government and specifically preempted by the controls exercised by the orders of the Secretary of Transportation and the Federal Aviation Administrator which allegedly authorize Concorde operations at JFK.

The defendants assert that the PA as the JFK airport proprietor, has the legal right to investigate the noise tolerability of the Concorde and meanwhile to exclude the Concorde from landing and take-off from JFK in scheduled commercial operations, absent an express declaration from the federal authorities that they have superseded local authority in this regard; and that no federal agency can use private or state property even for scientific explorations without their consent. In short, defendants urge that Congress has not clearly preempted a local airport operator's powers to accept or reject aircraft for landing and take-off at its airport; that there is no express federal preemption with respect to regulation of noise by local airport operators.

The issues are presented to the Court on plaintiffs' motion for summary judgment. All parties are in agreement that there is no factual issue which is material to the disposition of this motion. The plaintiffs submitted a statement pursuant to Rule 9(g) of the General Rules of this Court setting out material facts to which there was no response and the facts so set out are not controverted by defendants.

For the reasons set out hereafter, the plaintiffs' motion for summary judgment is granted.

I.

The undisputed facts

The plaintiffs' 9(g) statement sets forth that the plaintiffs are foreign air carriers engaged in foreign air transportation and hold permits issued by the Civil Aeronautics Board ("CAB") approved by the President of the United States authorizing them to engage in foreign air transportation of persons, property and mail respectively between London or Paris and New York. They each hold operations specifications issued by the Federal Aviation Administration ("FAA") which specify in each case that it may conduct operations at New York through JFK, and which, "pursuant to the Decision and Order of the Secretary of Transportation, February 4, 1976, have been amended to specify that it may conduct operations at JFK and Dulles International airports with Concorde" aircraft subject to certain conditions and limitations. The PA maintains and operates JFK under lease from the City of New York.

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The 9(g) statement further recites that:

On February 4, 1976, William T. Coleman, Jr., United States Secretary of Transportation ("the Secretary"), rendered a Decision and Order authorizing plaintiffs to conduct limited scheduled commercial operations of the Concorde aircraft to and from the United States for a trial period not to exceed 16 months.

The Secretary's Decision and Order ordered the Administrator of the FAA to amend the operations specifications of British Airways and Air France to permit, subject to the terms and conditions set forth in the Decision and Order, two Concorde flights a day by each plaintiff into and out of JFK and one Concorde flight a day by each plaintiff into and out of Dulles International Airport ("Dulles") in Virginia, serving Washington, D.C. The operations specifications were so amended on April 6, 1976.

By letter dated March 11, 1976, plaintiffs notified the Authority of their intention to schedule commercial flights at JFK beginning on or about April 10, 1976.

On March 11, 1976, the Authority purported to deny permission to plaintiffs to operate the Concorde into or out of JFK, asserting, as grounds for its decision, a desire to make an independent evaluation of noise data and community reaction relative to the Concorde, based upon operating experience at Dulles Airport, Heathrow Airport in London, and Charles de Gaulle Airport in Paris.

II.
The legal issues before the Court

(a) Preemption

A straightforward question of federal supremacy is raised in this case. The Court is drawn to this issue only to declare the scope of the congressional grant of federal power in the premises, the scope of the exercise thereof by the federal authorities and whether the local action by the PA clashes therewith or with the effective exercise of the nation's foreign policy or with the nation's agreements with foreign countries.

The Concorde is a supersonic transport aircraft of European design, manufactured jointly by the British and French and is the first commercial transportation application of the new supersonic technology used for military aircraft for over 20 years. The Court is not involved in the wisdom of the federal action or the objective or subjective acceptability of the noise levels of the Concorde. The local proprietor of JFK has banned the Concorde from a provisional, limited try-out at JFK while the PA investigates the noise quotient of the aircraft.

The government's purpose in authorizing the tests is to obtain actual operational data in the interests of scientific technological progress and aviation policy. These operations were to correctly assess and reach proper conclusions on the economic and environmental impact from actual operational data. If indeed there are defects in this generation of the aircraft then the tests would serve toward conceivable development of a cleaner, quieter, more efficient supersonic transport.

Congress has placed with the federal Administrator[1/] the regulation of the use of navigable airspace. Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1970).

1/ All functions, powers, and duties of the Federal Aviation Agency and of the Administrator and other offices and officers thereof were transferred by Publ. L. 89-670, Oct. 15, 1966, 80 Stat. 931 to the Secretary of Transportation, with the functions, powers and duties of the Secretary of Transportation pertaining to aviation safety to be exercised by the Federal Aviation Administrator in the Department of Transportation. See sections 1655(c) and 1657(f) of Title 49 U.S.C.

Congress has (in 49 U.S.C. § 1353(a,b,c) directed the federal Administrator under the head of "Development Planning" to make long range plans for and use of navigable airspace; and location of landing areas. Congress has empowered the Administrator to undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft, aircraft engines and appliances. And Congress has placed duties on the Administrator to conduct aircraft research and development and testing and evaluation thereof.

> (c) The Administrator shall develop, modify, test, and evaluate systems, procedures, facilities, and devices, as well as define the performance characteristics thereof, to meet the needs for safe and efficient navigation and traffic control of all civil and military aviation [with exceptions not here relevant] ... and select such systems, procedures, facilities and devices as will best serve such needs and will promote maximum coordination of air traffic control and air defense systems....

Within that mandate it has been appropriately held that test flights of commercial supersonic transports (such as the Concorde) in the course of a sonic boom program were an appropriate exercise of the

Administrator's function. The tests ordered were to determine public acceptability and effect on ground structures of anticipated booms as a result of the flights. Such tests tend to the creation of improved aircraft. Coxsey v. Hallaby (W.D. Okl. 1964), 231 F. Supp. 978, where the Court said:

> The FAA is authorized under 49 U.S.C. § 1353(b) to conduct tests which tend to the creation of improved aircraft. The SST clearly falls within the category of such 'improved aircraft.' (p. 979)

Congress has defined the responsibilities of the Secretary of Transportation in respect of leadership, consultation and coordination. 49 U.S.C. § 1653, Subdivision(a) thereof provides:

> The Secretary in carrying out the purposes of this chapter shall, among his responsibilities, exercise leadership under the direction of the President in transportation matters ... provide leadership in the development of national transportation policies and programs, and make recommendations to the President and Congress for their consideration and implementation; promote and undertake development, collection, and dissemination of technological, statistical, economic and other information relevant to domestic and international transportation; ... promote and undertake research relating to transportation, including noise abatement, with particular attention to aircraft noise; ....

(b) The federal decision to test the Concorde.

After extensive public hearings and consideration of environmental impact statements, the public interest, environmental protection, noise control and other relevant matters involved, the Secretary of Transportation issued his order of February 4, 1976. This directed the Federal Aviation Administrator to permit British Airways and Air France, for a period of 16 months, on a provisional and restricted basis, to conduct up to two scheduled commercial flights per day of the Concorde into JFK and one flight per day into Dulles Airport, by each carrier. A series of careful restrictive terms to minimize noise annoyance conditioned this provisional grant. A saving clause made the permit revocable on four months' notice, or immediately in the event of an emergency deemed harmful to the health, welfare or safety of the American people.

Acting on the Secretary's decision, the Federal Aviation Administrator on April 2, 1976 issued unequivocal amendments to the operations specifications for each carrier to conduct the authorized flights to and from

JFK and Dulles.[2/] These included specific technical departure procedures for purposes of noise abatement.

The amendments to the Operations Specifications under the Secretary's instruction read, in part: "The air carrier is authorized to conduct two Concorde flights a day, scheduled or chartered, to and from John F. Kennedy International Airport, New York, New York, and one scheduled flight a day to and from the Dulles International Airport, Washington, D.C., for a period not to exceed 16 consecutive months."

Meanwhile, the PA adopted its resolution of March 11, 1976 banning the Concorde from JFK, until further action of the Board, without a factual trial at JFK.

2/ The instruction of the Federal Aviation Administrator of April 2, 1976, to the Assistant Administrator stated inter alia, "Specific operating and scheduling conditions have been inserted into the operations specifications consistent with the February 4, 1976 decision of the Secretary of Transportation ... The amendment as approved permits regular Concorde service to only John F. Kennedy International Airport in New York and Dulles International Airport serving Washington, D.C. ... It is directed that the operations specifications be issued to the carriers."

The ostensible purpose was to enable the PA to evaluate Concorde noise on at least six months of operating experience at Dulles Airport and also at Heathrow and de Gaulle Airports, the community reaction thereto and the results of the monitoring program at Dulles and to secure additional information concerning the Concorde's noise and other environmental characteristics.

Reacting thereto, the Secretary of Transportation issued a public statement mentioning inter alia that many transatlantic passengers originate or terminate their flights in New York, that he believed the unique interests of the citizens of New York are adequately protected by the prescribed strict limitation on the number of flights, the close monitoring of aircraft by the federal agencies and the safeguard allowing immediate termination for cause in the public interest. He added:

> I might add that it seems to me it is also in the interest of New York as the major commercial center on the east coast to participate in the demonstration of a new technology that could be a significant benefit to international commerce.

***

> It is in any event in the national interest to begin as much of the demonstration as possible as soon as possible.

The federal orders provide a curfew -- no flight may be scheduled for landing or take-off in the United States before 7 A.M. or after 10 P.M. The period of exposure to the aircraft noise on take-off would be short, generally under a minute -- or less than four minutes a day in all at JFK. The four authorized flights into and out of JFK would constitute up to a daily total of eight operations out of a current daily average total of nearly one thousand operations at that airport.

The Secretary observed that it would obviously be extremely unfortunate if the provisional test flights did not go forward.

The PA held firm to its resolution nonetheless, precipitating the filing of this suit to remove the block to a fair trial of the Concorde at JFK under closely limited test circumstances.

III.

Legislative, administrative and case histories

The leading federal act governing air commerce is the Federal Aviation Act of 1958, 49 U.S.C. § 1301, et seq. The statute is broadly drafted and as expressed leaves no doubt of adequate statutory authority to land the Concorde at JFK.

Congress added an express noise abatement provision to the Act in 1968, 49 U.S.C. § 1431. This statute again was broadly drafted and its express provisions leave no doubt of adequate statutory authority paramount to that of airport proprietors in the regulation of noise and noise abatement. The Act passed by Congress is facially unequivocal and makes clear the federal government's exclusive statutory responsibility for noise abatement through regulation of

flight operations and aircraft design.

The Senate Report in connection with the enactment stated:

> However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.
>
> Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.

This congressional statement refers, not to any restriction on the pervasive power granted in the statute, but to the voluntarily granted authority as matter of FAA policy, delegated to local airport proprietors in the matter of regulating noise. This delegation was at will and subject to the ultimate pervasive federal control.

In 1972 minor amendments were made to this noise abatement provision of the Federal Aviation Act of 1958. 49 U.S.C. § 1431 (Supp. III, 1973). Again, the congressional reports made it clear that no change in the existing federal policy toward airport proprietors was intended. Thus, The Senate Bill, which would have contained a provision expressly preempting States from using their police power to pass noise standards unless identical to the federal ones, stated:

> States and local governments are preempted from establishing or enforcing noise emission standards unless ... identical to standards prescribed under this bill. This does not address responsibilities or powers of airport operators, and no provision of this bill is intended to alter in any way the relationship between the authority of the Federal government and that of State and local governments that existed with respect to matter covered by section 611 of the Federal Aviation Act of 1958 prior to enactment of the bill.

Nonetheless, 49 U.S.C. § 1431 as enacted by Congress makes evident the paramount control of FAA in the field of noise:

> [T]he FAA, after consultation with the Secretary of Transportation and with [the Administrator of the Environmental Protection Agency] shall prescribe and amend ... such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment [or] modification ... of any certificate authorized by this subchapter.

In City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) Mr. Justice Rehnquist (in dissent, joined by three other Justices) referring to the foregoing stated:

> very likely the authority conferred on the Administrator of FAA by 49 U.S.C. § 1431 is sufficient to authorize him to promulgate regulations effectively preempting local action. (Id. at 653).

The background of the congressional reports was a federal policy of the FAA delegating to local airport owners the control of noise at their airports by non-discriminatory regulations. This policy undoubtedly stems from the problems arising from case law imposing

civil liability on such owners for noise damages through failure to properly exercise their powers of control of land use around airports. Griggs v. Allegheny County, 369 U.S. 84 (1962). As expressed by the Secretary of Transportation, "a local airport proprietor has had [under the federal policy] authority under certain circumstances to refuse landing rights."[3/]

This authority of the local proprietor is subject, in addition to any overriding federal action, to at least two further restrictions. It may not take any action that imposes an undue burden on interstate or foreign commerce and it may not unjustly discriminate between different categories of airport users.

The statement of the Department of Transportation on Aviation Noise Abatement Policy issued November 18, 1976 reads:

> We have been urged to undertake -- and have considered carefully and rejected -- full and

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3/ PA has had a regulation at JFK since 1951 stating that no jet aircraft shall land at the airport without permission.

> complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users and governments. (p.34).

However as already indicated, the policy allowing the airport proprietor to impose use restrictions pertinent to the perceived local noise problem, is a delegated authority reviewable by and subject to the overriding control of federal authority when exercised. The November 18, 1976 statement of the Department of Transportation correctly expresses the caveat that local regulations may not override national purposes:

> While the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Pursuant to the general federal interest ... and the specific FAA responsibility for regulating the air navigation system, the federal government has the obligation to assure that airport actions to meet local needs do not conflict with national and international purposes. (p.58).

IV.

Relationship of federal and local authority as applied.

Whether the PA resolution is precluded depends upon whether there is conflict between the federal and local regulation which has been attempted with specific reference to Concorde.

A purpose of the federal regulator to preempt a specific matter may be found where the local action produces a result inconsistent with a federal ruling under the relevant federal statutes. Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1946). Federal action will under the Supremacy Clause, invalidate local action where there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area, ... Head v. New Mexico Board of Examiners, 374 U.S. 424, 430 (1963), quoting, Florida Avocado Growers v. Paul, 373 U.S. 132, 141 (1963). This doctrine was recently reaffirmed in Jones v. The Rath Packing Co., 45 U.S.L.W. 4323, 4325 (March 29, 1977):

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict.

> U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' .... This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

V.

The federal authority as applied

The Secretary of Transportation rendered a Decision and Order dated February 4, 1976 within his statutory powers, 49 U.S.C. § 1354(a):

> The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations and provisions of this chapter, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under this chapter.

There was no need for the Secretary to announce expressly in his decision that he was preempting any regulation of the PA such as the one requiring PA permission for jet aircraft to land at JFK (its only avowed noise regulation). See City of Burbank v. Lockheed Air Terminal,

411 U.S. 624, 633 (1933). Nor was it necessary to expressly announce that the federal policy "in certain circumstances" to authorize the airport proprietor to regulate noise was inapplicable to the provisional permit granted. The Secretary's decision makes this inapplicability manifest.

The Secretary, at the very outset, defined the issue being addressed:

> The issue before me is whether to permit Concorde supersonic transport aircraft, manufactured jointly by the British and French, to operate in limited scheduled commercial service to and from the United States as follows: not more than four flights per day into John F. Kennedy International Airport (JFK) located on Long Island, New York, and not more than two flights per day into Dulles International Airport located in Fairfax and Loudoun Counties, Virginia.

The Secretary's Decision resolved that issue:

> I have decided for the reasons set forth below to permit British Airways and Air France to conduct limited scheduled commercial flights into the United States for a trial period not to exceed 16 months under limitations and restrictions set forth below. I am thus directing the Federal

> Aviation Administrator ... to order provisional amendment of the operations specifications of [the Airlines] to permit those carriers, for a period of no longer than 16 months from the commencement of commercial service, to conduct up to two Concorde flights per day into JFK by each carrier, and one Concorde flight per day into Dulles by each carrier.

Almost at the outset of the Decision, the Secretary explains the scope of the problem addressed.

> This decision involves environmental, technological and international considerations that are as complex as they are controversial, and do not lend themselves to easy or graceful evaluation, let alone comparison.(7).

Contrasting the Concorde with subsonic jets the Secretary stated:

> The Concorde is sufficiently different from subsonic jet aircraft in its environmental characteristics that admission on a trial basis and the imposition of different operating requirements are amply justified. (12).

The purpose intended and the federal authority being applied is expressed in the Decision as follows:

> As the Secretary of Transportation, I am charged by the DOT Act [Department of Transportation Act, 49 U.S.C. § 1651(a)(1970)] with 'the development of national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation....' I am directed 'to stimulate technological advances in transportation ... (and) provide general leadership in the identification and solution of transportation problems.... Under the Federal Aviation Act, as amended by the DOT Act, I am also instructed to 'encourage and foster the development of civil aeronautics and air commerce in the United States and abroad.'

The Secretary made evident that the permit he was considering and deciding was "whether the Concorde should be permitted to land" (17) and that he was evaluating "any adverse effect on the environment against the benefits to be derived from technological progress and international cooperation" (17). The "benefits" to be gained included,

he said, "the knowledge that will be gained from testing the environmental consequences and commercial viability of the Concorde in order to determine whether private capital should be committed to the development of a cleaner, quieter, more efficient SST".... (22).

Expounding on the policy framework and functional basis of his action and tieing it to authority and functions recognizable under 49 U.S.C. §§ 1353, 1653, the Secretary remarked: 4/

> As we have benefitted from the advances of science and technology, so we must welcome technological innovation, recognizing that what is new is unknown and that progress is possible only with some tolerance and assumption of risk. (22)

***

4/ The absence from the Secretary's Decision of a reference by statutory number of a statute relied on herein is of no relevance. It is the content of the Decision which is expressive of its grounds. The Decision explicitly and in detail shows that the grounds relied on by the Secretary are within the scope of the statutes mentioned in this Opinion.

> [history] teaches that the benefits of new technologies are not always readily apparent at the time they are introduced. At various points in our history, if we had not acted with foresight we would never have seen the development of the steamboat, the railroad, or the automobile. The advent of the jets was accompanied by substantial debate and public apprehension. (59-60)
>
> ***
>
> I believe this demonstration is needed to determine whether a committment to this new technology should be embraced. (61)

The Decision specifically addresses the noise impact of the Concorde, stating that "noise is the factor which has generated by far the greater part of the controversy surrounding the British and French request".... (42) In assessing the nature of the noise impact the Secretary evaluated its nature and effect, a comparison to that of other aircraft and specifically, "The effect of Concorde noise on residents of the areas around JFK and Dulles" (42). Precisely the same subject as that last mentioned is the subject of the PA resolution of March 11, 1976. The PA has, in the record before the Court and publicly, expressed its role as limited to the question whether the Concorde can meet the noise criteria applicable to its use of Kennedy Airport.

Again, referring to the responsibilities of the Secretary, 49 U.S.C. § 1653, the statute commands that he "shall" "promote and undertake research and development relating to transportation, including noise abatement, with particular attention to aircraft noise." The Administrator is "directed" and "empowered" to and "shall develop, modify, test and evaluate systems, procedures, facilities and devices...." 49 U.S.C. § 1353(a,b & c). He "shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension or revocation of any certificate authorized by this title." 49 U.S.C. § 1431 (Supp. III, 1972).

Analyzing the accumulated date before him, the Secretary makes the following findings:

> The noise analysis is quite complete, and yet it gives me no clear direction, ... the cumulative noise figures show that hundreds of thousands of people would find that they lived in a somewhat noisier environment.... (48)

> To clarify the context in which we are operating, I might note that an air carrier could, without amending its operations specifications, increase the total noise around an airport more than it will be increased by the proposed Concorde flights simply by adding a few extra flights by, say, B-707s or DC-8s. (49)

Touching on the need for actual operating data, the catalyst for the experimental test operations at JFK, the Secretary observed:

> Perhaps even more significantly, the noise data [on hand] provide me with only a descriptive and statistical view of the noise impact. Noise is not an objective experience; people do not agree on how objectionable a given sound may be. Noise is a source of great irritation to some, but of little to others. People may react more intensely to Concorde noise than they would to another new and equally loud source, merely because of the controversy which has surrounded the introduction of that aircraft. (49).
>
> The EIS indicates to me that the marginal impact of six [four at JFK and two at Dulles] additional flights would be small. (50).

Comparing the storm of protest over the noisiness on the introduction jet aircraft engines into commercial service and the technological advances thereafter, the Secretary wrote that "Similar technological advances are believed possible with the SST" (52). "Only through actual operations will the nature of the demand for supersonic travel become clear" (52).

VI.

The conclusions reached by the federal Administrator

The Secretary concluded that "on the basis of currently available information", noise and other impact, "are not significant reasons for denying limited operations" (57); "the limited flights under consideration will have a negligible impact on total aircraft noise exposure at Dulles and only a marginally incremental impact at JFK" (58). "I believe that this environmental cost is outweighed by the benefits that will accrue to the American people from the demonstration," (58) i.e., "from observing first hand the application of this technology" (60).

The Secretary completes his findings on the test operations with the statement that "I believe that this demonstration is needed to determine whether a committment to this new technology should be embraced" (61).

To those concerned with the view that opening the door to test operations necessarily spells letting down the flood gates to the Concorde, the Secretary emphatically rejects their fears that inertia alone would control:

> I cannot emphasize too strongly that my decision today is firmly and unequivocally limited to not more than six flights per day [four at JFK], and that the authority I grant is provisional for 16 months from the commencement of operations, if not revoked earlier. (23)
>
> I would not hesitate to bar an expansion of the number of flights or indeed even an extension ... if ... the demonstration shows that the noise or emissions have a significant adverse impact on the environment. (24)

VII.

Irreconcilable conflict voids the local action

Self-evidently then, the PA resolution in effect nullifying the permits to the air carriers based on a purpose of PA to re-review the noise criteria applicable to the use of the Concorde at JFK, is in irreconcilable conflict with the federal examination of the question and the federal orders thereon and the PA resolution must give way under the Supremacy Clause in the Constitution. At the hearing of the motion, counsel for PA responded to the Court's inquiries as follows:

THE COURT: Do you concede that the Secretary of Transportation has the power to order scientific studies?

MR. FALVEY: Yes, he does, but that does not mean --

THE COURT: Has he ordered a scientific study in this case?

MR. FALVEY: Yes, he has.

THE COURT: To determine the technology?

MR. FALVEY: Yes, he has. (Mins. 83-84)

***

THE COURT: Aren't his powers of control of development planning and noise control and abatement and the promotion and undertaking of research and development superior to the authority of the Port Authority?

MR. FALVEY: Yes, your Honor, but that's got nothing to do with how they use a particular airport which is the key point here. (Mins. 84).

Later Mr. Falvey expressed the erroneous view that: "What you need for the Federal Government to supersede local authority would be an express declaration that it has superseded local authority." Labelling the action taken would seem to be superogation.

Nullification or stultification of the federal review of the noise problem at JFK is not a prerogative of the PA. The superseding federal orders were founded in federal statutes or regulations. See 61 Va. L. Rev. 1299, 1331 (1975). The PA resolution of March 11, 1977 is void and plaintiffs are entitled to the declaration and injunction they seek.

It is unnecessary to treat the other grounds on which plaintiffs seek relief, viz., the claimed conflict of the PA resolution with international agreements and foreign policy. Those grounds are not applicable to experimental tests which are the only subject matter ruled on by the Secretary and banned by the PA.

Submit judgment in accordance with this decision within 10 days hereof, after counsel have conferred on the form of the proposed judgment.

May 11, 1977

Milton Pollack
U.S. District Judge

JUDGMENT AND ORDER WITH TEMPORARY STAY SIGNED BY JUDGE POLLACK, DATED MAY 20, 1977 - Pg. 182-184

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED MAY 20 1977 S.D. OF N.Y.

BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY; WILLIAM J. RONAN; W. PAUL STILLMAN; JAMES G. HELLMUTH; VICTOR R. YANITELLI; MILTON A. GILBERT; JAMES C. KELLOGG, III; ALAN SAGNER; JOSEPH F. CULLMAN, III; JANE ENGLEHARDT; LEWIS L. GLUCKSMAN; ROBERT F. WAGNER; Commissioners of the Port Authority of New York and New Jersey, and HOWARD SCHULMAN, Commissioner Designate of the Port Authority of New York and New Jersey,

Defendants.

76 Civ. 1276 (MP)

JUDGMENT

Plaintiffs having moved this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an Order granting summary judgment in favor of Plaintiffs, and the Court having read the Complaint and the Answer herein, the Affidavit of John A. Wells, Esq., sworn to the 12th day of July, 1976, and the exhibits annexed thereto, and Plaintiffs' 9(g) Statement of Material Facts, as to which there is no dispute, and upon all prior pleadings and proceedings herein, and said motion having come on to be heard before this Court on April 28, 1977, and the Court having heard the arguments of John A. Wells, Esq. and Peter J. Nickles, Esq., in support of said motion and

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the arguments of Patrick J. Falvey, Esq., in opposition thereto and of Geoffrey Kalmus, Esq. and William D. Rowan, Esq., as amici, and the Court being fully advised in the premises and having filed its Decision dated May 11, 1977, and it further appearing to the Court that Plaintiffs are entitled to judgment as a matter of law, it is

ORDERED, that Plaintiffs' motion for summary judgment be, and the same hereby is, granted; and it is further

ORDERED, ADJUDGED AND DECREED, that the March 1, 1976, Resolution or any other actions of Defendants, The Port Authority of New York and New Jersey and its Commissioners insofar as they purport to prevent, delay, interfere with or impede operations of Concorde aircraft by Plaintiffs to, from and at John F. Kennedy International Airport in accordance with the provisions of the Decision and Order of William T. Coleman, Jr., United States Secretary of Transportation, issued February 4, 1976, and Plaintiffs' amended Operations Specifications issued by the Federal Aviation Administration and dated April 2, 1976, are hereby declared to be unlawful; and it is further

ORDERED, ADJUDGED AND DECREED, that Defendants, The Port Authority of New York and New Jersey and its Commissioners, its and their agents, servants, employees, and all other persons, in active concert with them or any of them, (hereinafter

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the "Enjoined") per; and they hereby are, enjoined from directly or indirectly preventing, delaying, interfering with or impeding the operation by Plaintiffs of Concorde aircraft to from and at John F. Kennedy International Airport in accordance with the provisions of the aforesaid Decision and Order of William T. Coleman, Jr., United States Secretary of Transportation, and Plaintiffs' amended Operations Specifications; and it is further

ORDERED, ~~ADJUDGED AND DECREED, that each of the defendants and said Persons Enjoined shall forthwith take all steps and perform all acts necessary to facilitate the operation of Concorde aircraft to, from and at John F. Kennedy International Airport in accordance with the provisions of the aforesaid Decision and Order of William T. Coleman, Jr., United States Secretary of Transportation, and Plaintiffs' amended Operations Specifications, including any preliminary route-proving flights necessary before such operation can be commenced~~ that effectiveness of this Order, Judgment and Decree is stayed until 4 P.M. Tuesday, May 24, 1977 on condition that defendants shall promptly file notice of appeal from this Order and Judgment and proceed with expedition thereunder.

Dated: ~~New York, New York May 20, 1977~~

Dated: May 20, 1977

Milton Pollack

United States District Judge

Judgment Entered

Raymond F. Burghardt 5/20/77

Clerk

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TRANSCRIPT OF ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DATED APRIL 28, 1977
Pg. 185-324

1 GWJW

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 ----------x

5 BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE, :

6 Plaintiffs,

7 :

v. 76 Civil 1276

8

9 THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY; WILLIAM J. RONAN; W. PAUL STILLMAN; JAMES G. HELIMUTH; VICTOR :

10 R. YANITELLI; ANDREW C. AXTELL; GEORGE F. BERLINGER; MILTON A. GILBERT;

11 ROBERT R. DOUGLASS; JAMES C. KELLOGG, III; GUSTAVE L. LEVY; MATTHEW NIMETZ; :

12 ALAN SAGNER, Commissioners of the Port Authority of New York and New

13 Jersey, :

14 Defendants.

15 ----------x

16 April 28, 1977
10:00 A.M.

17

18 B E F O R E :

19 HON. MILTON POLLACK,

20 District Judge.

21

22

23

24

25

1
2 A P P E A R A N C E S :

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5
-and-
6
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11 Air France
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19

PATRICK J. FALVEY, ESQ.,
20 JOSEPH LESSER, ESQ.,
Attorneys for Defendants
21 One World Trade Center
New York, New York
22
23
24
25

A P P E A R A N C E S (Continued) :

JOHN F. HELLEGERS, ESQ.,
Attorney for Environmental Defense Fund
1525 18th Street N.W.
Washington, D.C.

WILLIAM D. DENSON, ESQ.,
Attorney for Town of Hempstead

oOo

(Case called)

THE CLERK: Counsel ready?

MR. WELLS: Ready, your Honor.

MR. FALVEY: Ready, your Honor.

MR. NICKLES: Ready, your Honor.

THE COURT: Mr. Wells, you may proceed.

MR. WELLS: May it please the Court, my name is John A. Wells. I am a partner in the law firm of Rogers & Wells which represents Compagnie Nationale Air France.

I would like, your Honor, to introduce Mr. Peter J. Nickles of Covington & Burling, which firms represents British Airways Board in this matter. He is a member in good standing of all the federal courts in the District of Columbia and others and I would like to have permission for him to argue this motion for plaintiff British Airways pursuant to General Rule 3-C of this court.

THE COURT: Is this gentleman a member of the bar in good standing?

MR. WELLS: Yes, he is, sir.

THE COURT: Motion granted.

MR. WELLS: Thank you.

Your Honor, I would like to hand up a stipula-

tion between the parties hereto which stipulates the substitution of the new members of the Port of New York Commission who have become members since this case was started, to remove the names of the members who have retired.

THE COURT: That may be delivered to the clerk and the caption is amended accordingly.

MR. WELLS: Thank you.

This, of course, your Honor, is a motion for summary judgment brought by the plaintiffs. We have filed a 9-G statement and there has been no response from the Port of New York.

Therefore, there are no factual issues and we are proceeding upon the basis of the papers before the Court.

THE COURT: I understood that at one stage the Port Authority affirmatively stated that they did not dispute the statements in the G-9 statement; am I correct?

MR. WELLS: I know they said that at a pre-trial conference, your Honor.

THE COURT: Until that has been modified in any way, I will assume that is the situation.

MR. FALVEY: That is the situation, your

Honor.

THE COURT: For the purposes of this motion for summary judgment, the allegations of fact in the 9-G statement will be taken to mean that there is no genuine issue of material fact with respect to those assertions and this motion for summary judgment will be guided accordingly.

MR. WELLS: Thank you, sir.

What we propose to do for the plaintiffs here, with your Honor's permission, is first I will briefly review the background of this case prior to the filing of the complaint.

Secondly, my confrere, Mr. Nickles, will argue the issue which is unique to foreign airlines, that is, that the Port Authority in seeking to exercise the power it is trying to exercise may not land the Concorde at JFK since that would violate the treaty and international obligations of the United States and otherwise disrupt the conduct of the country's foreign regulations.

After Mr. Nickles has made that presentation, I will argue that the Port Authority is illegally invading an area of regulation which has been generally preempted by the federal government and specifically preempted by the controls exercised by Secretary Coleman's

decision and order of February 4, 1976 which authorizes Concorde operations at JFK.

As to the background of the case. In August and September 1975 the airlines sought to have the FAA, the Federal Aviation Administrator, amend their operations specifications to include the Concorde. This amendment, of course, was necessary to commercial operation in the United States.

Because of the extraordinary public policy issues which were involved in this matter, Secretary of Transportation Coleman himself undertook to review, to hold hearings and to make the decision.

The proceedings were extremely lengthy. Hearings were held in New York, a lengthy and very detailed Environmental Impact Statement, the EIS was prepared, as required by law, and on January 5, 1976 Secretary Coleman himself held a seven hour hearing in Washington where some sixty witnesses appeared for and against the Concorde.

There were also masses of communications submitted by parties in interest. My recollection is that prior to the Coleman hearing they totaled some 1700 and after the Coleman hearing there were several hundred more written submissions made for the record.

Secretary Coleman's complete and careful decision on the airlines application for amendment of operations specifications was based, he said, and I quote from his decision and order:

"On my review of the EIS on the January 5th hearing and on my subsequent review of the transcripts and other written materials submitted for the record."

In general terms, Secretary Coleman decided, and I quote again, "To permit British Airways and Air France to conduct limited scheduled commercial flights into the United States for a trial period not to exceed sixteen months." That is at page 3 of his decision.

He closed at page 61 by saying, by writing, "By ordering the Federal Aviation Administrator to issue on March 4, 1976 an order provisionally amending the operations specifications of British Airways and Air France as described and subject to the terms and conditions set forth on pages 3 and 4 above."

In my treatment of federal preemption, I will deal more closely and in greater detail with the Secretary's decision and order which we submit is the crux of this case.

The Secretary's decision and order detonated a mushroom cloud of antagonistic litigation. The various cases are described, your Honor, in our letter to the Court, dated April 26, 1977. All told there were a total of nine suits in or about the District of Columbia during 1976 and three proceedings brought before the Civil Aeronautics Board.

Suffice for now to say that Secretary Coleman's action stood solid as a rock and that the Court of Appeals for the District of Columbia Circuit heard several petitions for review of the Coleman decision on May 19, 1976, and in its memorandum an order of the same day held, and I quote:

"This Court is in agreement with the Secretary that in the circumstances of this case his order for such a trial period," that is the 16 months as provided in his decision, "at JFK is within his authority and competence and is not arbitrary or capricious or otherwise in violation of law."

This was taken to the Supreme Court of the United States by the opponents and on the 16th of November 1976 the Supreme Court denied certiorari.

Secretary Coleman's decision and order also resulted in bills and debates in Congress. In the summer

1 eorf 2

2 of 1975, of course, some ban Concorde efforts had been made
3 in the Congress and had been defeated, but after the Coleman
4 order of February 4, 1976, there was a spate of bills,
5 amendments, resolutions and so forth which, if any had
6 passed, would have reversed the Coleman decision by the
7 ukase of the Legislature.

8 Again, our letter to the Court of April 26, 1977
9 sets out the details.

10 In the Senate, Senator Weicker of Connecticut,
11 Bell of Maryland and Bumpers of Arkansas each offered
12 an amendment in an all-out effort to amend the then pending
13 Airport and Airway Development Act of 1976 by banning
14 Concorde operations in the United States. In the three-
15 hour debate on this bill, Secretary Coleman's decision
16 and order was the principal topic. All three amendments
17 were defeated by roll call votes voting from 50 nays
18 to 31 yea's on the Weicker amendment and 49 yea's to 29
19 nays on the Bumers amendment.

20 In the House of Representatives there were nine
21 bills and resolutions introduced in the House, all of which
22 died in committee. When the House of Representatives debated
23 the Airport and Airways Development Act of 1976 amendments
24 similar to those defeated in the Senate were separately
25 offered by Representatives Koch of New York, Yates of

1 eorf 3

2 Illinois and Herbert Harris of Virginia. Each was defeated.

3 Yates was defeated by 269 nays to 126 yea's.

4 Koch 228 nays to 170 yea's.

5 The Harris amendment was rejected without a

6 roll call vote.

7 So here we have a situation, your Honor, in

8 which the three branches, in effect, the three branches

9 of our Federal Government, the Executive, the Legislative

10 and the Judicial are on record as supporting or at least

11 refusing to reverse Secretary Coleman's decision and order

12 on the Concorde.

13 The Carter Administration, of course, has not

14 changed the Executive stance on the Concorde, but the

15 Port Authority in this case takes the position that,

16 nonetheless, it has the power to veto the national will.

17 If the Port Authority is allowed to do this on

18 the record in this case with respect to the Concorde,

19 the Constitutional Convention of 1789 was in vain and

20 we are back in the days of the Articles of Confederation.

21 THE COURT: That is a little overdrawn,

22 isn't it?

23 MR. WELLS: I thought I might be permitted

24 in argument a little hyperbole.

25 On March 11, 1976 the airlines notified the

1 Port Authority that they intended to exercise the rights
2 granted by beginning commercial flights into JFK on
3 or about April 10, 1976 and this communication is annexed
4 to the complaint as Exhibit A.
5 The Port Authority Commissioners, who were in
6 session that day, immediately voted to ban Concorde
7 night operations at JFK.
8 Significantly, although the resolution referred
9 to the 112 PNdB, which is Perceived Noise in Decibel Rule,
10 at JFK, that is not the basis of the resolution. The
11 resolution does not invoke any rule or regulation of
12 general application. Instead, it states that the permission
13 to operate the Concorde at JFK would be denied, one, until
14 the six months study had been completed by the Port
15 Authority, which analyzed the subjective reaction to
16 operations of Concorde at Dulles, Heathrow and deGaulle
17 Airports and, secondly, further analyzing various legal
18 issues and the like.
19 The resolution by the Port Authority, which was
20 passed on that day, is a political document by which the
21 Authority asserts for itself the power, regardless of the
22 conclusions or orders of the Federal Government, to
23 determine whether Concorde may use JFK and essentially
24 seeks to duplicate in time the exhaustive federal study
25

1 already conducted and to make its own decision.

2 The resolution of the Port Authority also

3 contained a clause which continued the ban indefinitely

4 pending further action by the Commissioners. More than

5 13 months have passed and there is still no Port Authority

6 decision and, frankly, none is in sight so far as I can

7 see, at any rate.

8 This suit was begun on March 17, 1976 and this

9 motion for summary judgment was filed on July 12, 1976.

10 It is against this background, your Honor, that Mr.

11 Nickles will argue that the Port Authority's ban violates

12 the Treaty in International Obligations of the United

13 States and disrupts the foreign relations of the United

14 States.

15 Mr. Nickles.

16 THE COURT: Mr. Nickles.

17 MR. NICKLES: Your Honor, may it please the

18 Court, the issue in this case was stated well and concisely

19 in this Court's order of July 6, 1976 in which the Court

20 acted on intervention petitions of the Town of Hempstead,

21 et al. The Court said at pages 2 and 3 of its order,

22 and I quote.

23 "The instant lawsuit will not resolve the

24 merits of the supersonic aircraft but simply the power

25

1 and authority of a local airport to deny entry to a plane
2 whose flights have been specifically approved by the
3 Federal Government."
4 Your Honor, the fact that the Federal Government
5 has given whatever authorization it is empowered to give
6 is at the heart of both the Treaty argument and the
7 preemption argument.
8 There is no dispute, your Honor, as to what the
9 federal authorities have given. Indeed, at page 4 of
10 the brief submitted by the Port Authority, the statement
11 is made, and I quote:
12 "What Secretary Coleman decided was to grant
13 whatever federal authorizations were required for the
14 Concorde to fly into JFK."
15 Your Honor, we are here on a summary judgment
16 motion and in the documents book we have submitted under
17 Tab 1 is the 9-G statement. Those are the facts that
18 govern resolution of this motion. Those facts are simply
19 stated, and this is not a complicated case. The issue
20 is the effect to be given to Secretary Coleman's specific
21 approval of the very flights in question in this lawsuit.
22 With respect to the Treaties, your Honor, the
23 Bermuda Agreement between the British and the United
24 States, the Paris Agreement between the French and the
25

1 United States and the multilateral convention, so-called
2 Chicago Convention, our position is that it being disputed
3 that the federal authorities have given or failed to
4 withhold whatever authorization the federal authorities
5 are empowered to give, the Port Authority is in no position
6 and has no power to take away, to undermine, to void, to
7 revoke those rights.
8 With respect to the Treaty, your Honor, there
9 are three basic elements that trigger the vesting of
10 rights under both the Bermuda Agreement and the Paris
11 Agreement. There is, first, the matter of a carrier
12 being designated by the home country to fly the route
13 between London and JFK. As your Honor will see in items
14 1 and 2 of the Statement of Material Facts, that is
15 stipulated. The British Airways and Air France have, in
16 fact, been designated by the particular governments
17 involved to fly the route in question.
18 In addition, there is the matter of the
19 home countries issuing Certificates of Airworthiness
20 with respect to the aircraft in question. As your Honor
21 will see in the Statement of Material Facts, item 4,
22 page 5, it is stipulated that Certificates of Airworthiness
23 that satisfied the Bermuda and Paris Agreements and the
24 Chicago Convention have been issued by the United Kingdom
25

and France for Concorde aircraft. So there is designation, there are Certificates of Airworthiness.

What is the second element? The second element is that the appropriate aeronautic authorities of the United States defined in the agreements as the Civil Aeronautics Board and those agencies that may perform functions that were currently, that is in 1946, being performed by the C.A.B.. that they give, after applying normal laws, permission.

What do the facts in once again the Statement of Material Facts indicate: that British Airways and Air France have obtained foreign air carrier permits approved by the President of the United States which specifically authorize foreign air transportation between London and JFK.

As we will see as I go on in the argument that there has been a specific attempt with respect to the Concorde by a number of entities, including the State of New York, an attempt to have the C.A.B. amend that very permit to preclude Concorde operations at JFK and the C.A.B. denied that request.

THE COURT: Is the authorization an authorization for scheduled commercial flights?

MR. NICKLES: Yes, your Honor.

The C.A.B, when it passes on these applications under Section 402 of the Federal Aviation Act, makes findings that the air carrier is fit, willing and able to perform the functions required under the Act.

It satisfied itself as to ownership, financial qualifications and the like. It is stipulated that these carriers have the requisite authority from the Civil Aeronautics Board.

So, secondly, we have the foreign air carrier permits.

Thirdly, the third item that triggers the vesting of treaty rights, it is what is commonly called the operations specifications. It has developed at the FAA, the Federal Aviation Administration, as a process, which was used in this case, albeit in this case Secretary Coleman took a personal hand in the matter, and these operations specifications attest to the fact that the Federal Aviation Agency, one of the other aeronautical authorities designated in the Treaty, is satisfied -- is satisfied-- that these air carriers should and are authorized to fly the Concorde aircraft between London and JFK.

Your Honor, these three items are not disputed. It is not disputed that these two carriers lack any element of federal authorization. Indeed, it is conceded that

they have every element of federal authorization.

What are the specifics? I would like, if I could, your Honor, to take the Court and the parties very briefly through certain of the documents that are contained in the documents book.

Under Tab 2 we have inserted the Operations Specifications of each of the two carriers. Pursuant to the decision of Secretary of Transportation Coleman, he directed the FAA to amend the Operations Specifications of the two carriers specifically to authorize Concorde operations at JFK and at Dulles Airport.

THE COURT: While you are on that point, the Order of the Secretary, as set out at page 6 of his Opinion and Decision, specifically says, "I hereby order the Federal Aviation Administrator to issue on March 4, 1976 an order . . . " et cetera.

What is the explanation for the delay from March 4th to April 2, 1976 when the Federal Aviation Administrator issued the Operations Specifications?

MR. NICKLES: Your Honor, the delay was a short delay. My understanding is that it was a normal delay, but when you look at the operations specifications, your Honor, and when you look at the decision, Secretary Coleman not only imposed certain conditions of his own

with respect to the operation of the aircraft, but he had to wait, under the CEQ guidelines, the passing of 30 days for finalization of the impact statement that accompanied his decision.

So, my best surmise, your Honor, is that it was a combination of allowing the 30 days to pass and satis faction on the part of the Secretary and the FAA that they had in place all of the noise abatement procedures that they believed appropriate.

Let me point to those specifically, your Honor, because the type of order that we have in this case is not the usual type of amendment to the Operations Specifications in which the FAA says to a carrier, "You may now fly between Chicago and Paris."

If I might, your Honor, looking at the operations specifications under "General Conditions," your Honor will find under "General Conditions A," specific limitations, not only as to time of day for flights, but specific noise abatement departure procedures at JFK.

In other words, this was not the ordinary kind of review that was engaged in by the Federal Government. The Secretary stated specifically the manner in which turns should be made after takeoff. The manner in which climbing left turns should be made off various

runways and, moreover, the Secretary stated in item 7 of the Operations Specifications that, and I quote:

"The FAA may modify these conditions and the procedures of 'B' and 'C' immediately below or impose such additional noise abatement procedures as are safe, technologically feasible, economically justified and necessary to minimize the noise impact, including but not limited to the thrust cutback on departure."

Your Honor will see on the next page the specific noise abatement, departure procedures that were imposed.

The Court will also see in Item 3, the Secretary stated that the experiment, the experiment that is being, to use the Secretary's terms, greatly diminished by the purported ban of the Port Authority, that the experiment, and I quote, "May be revoked at the same time upon four months notice or immediately in the event of an emergency deemed harmful to the health, welfare or safety of the American people."

Your Honor, under Tab 3 what do we have? We have an order issued by the Civil Aeronautics Boards, the other aeronautical authority specified in the treaty. This is an order issued April 6, 1976, and your Honor will see that what happened there is that after the Secretary of Transportation issued his decision, and after the FAA amended the operations and specifications, a number of parties, including the State of New York, went to the C.A.B. and asked that there be a hearing, a further hearing. They alleged matters of safety, noise, admissions standards, ozone dimension and the like.

The C.A.B., your Honor, said at page 3 :

"The public has had ample opportunity to

1 g hjw 2 206a

2 present positions and articulate views in an appropriate
3 forum on the fundamental issue of whether Concorde operations
4 into the United States should be permitted in light
5 of the full spectrum of environmental considerations
6 relevant to NEPA."

7 So, your Honor, we have specific, explicit
8 review not only by the Federal Aviation Administration,
9 not only by the Civil Aeronautics Board, but by the
10 Secretary of Transportation himself, and the result of
11 the process is that we all agree, the Federal Government
12 has stated, Concorde landings should be permitted at
13 JFK.

14 Your Honor, what has been the reaction of
15 the Port Authority?

16 The Port Authority has issued a resolution,
17 which is attached in our documents book as Item 4.
18 There is no claim made in that resolution, your Honor,
19 that the Concorde fails to meet any law, any regulation.
20 The only claim that is made is that the Port Authority
21 should have more time to see how the people around
22 Heathrow Airport and around deGaulle Airport and around
23 Dulles Airport, what their reaction to the Concorde is.

24 What happens?

25 The Port Authority in effect says: We'll do

Secretary Coleman's job over again. We aren't satisfied that the process went on for two years. We aren't satisfied that the process went to the D.C. Circuit Court of Appeals and went to the Supreme Court. We aren't satisfied that we were heard by the Civil Aeronautics Board. We aren't satisfied that there were nine lawsuits.

Your Honor, I have attached as Exhibit 5 a letter that was written by Mr. Falvey, the general counsel to this Court, on June 3, 1976 because at page 2, the first full paragraph under Item 2, I think we have the clearest explanation of what the resolution of the Port Authority is all about.

Mr. Falvey writes:

"The Port Authority resolution of March 11, 1976, which is the subject of this litigation, does not apply the 112 PNdB standard to the Concorde. Instead, it denies permission for any supersonic aircraft, including the Concorde, to operate at Kennedy Airport pending an in-depth analysis of the Concorde's noise characteristics and evaluation of community reaction thereto."

Under Tab 6 your Honor will find the latest resolution of the Port Authority issued on April 14, 1977 and submitted to this Court this past Monday in which the Port Authority has now established a committee, and

1 further evidence is to be taken, further second guessing
2 is to take place.
3 Your Honor, they quote a case that I hadn't
4 looked at since I was in law school, a case in 1796 by the
5 Supreme Court, Ware v. Hylton.
6 "A treaty cannot be the supreme law of the
7 land, that is, of all the United States, if any act of
8 a state legislature can stand in its way.... If a law
9 of a State, contrary to a treaty, is not void, but void-
10 able only, by a repeal, or nullification by a State
11 Legislature, this certain consequence follows, that the
12 will of a small part of the United States may control
13 or defeat the will of the whole."
14 That is why we are here. That is what we
15 have.
16 Your Honor, I would like to proceed briefly
17 through the treaty, the Bermuda and the Paris Agreements
18 are in pertinent part the same, and I would like to take,
19 if I might, the Bermuda Agreement as an example.
20 I think it important to understand that the
21 Bermuda Agreement was the model for some 150 Air France
22 transport agreements. It came upon the heels of the
23 Chicago Convention. It ushered in a new day of air
24 transportation. Aviation has lived well under the benign
25

1 influence of the Bermuda Agreement and I would hate to
2 predict the implications of undermining the rights granted
3 in the Bermuda Agreement by the kind of action which the
4 Port Authority has taken here.
5 But the critical point, your Honor, is that
6 this was not a one-shot agreement, this was not an agree-
7 ment to take care of one airplane. This was an agreement
8 for the agents. This was an agreement to promote, as
9 the preamble itself states, to promote the direct air
10 communications between friendly nations.
11 Now, in Article 1, your Honor, each contract-
12 ing party, the United States and Britain and France,
13 not the Port Authority, each contracting party grants to
14 the other contracting party certain rights to establish
15 air service.
16 And where are those rights spelled out, your
17 Honor? The treaty says in Article 1: Look at the annex.
18 So we look at the annex. It's at page 731.
19 Annex Article 1 says:
20 "For the purpose of operating the air services
21 that are specified in Section 3, the designated air carriers"--
22 it's been stipulated that we are designated air carriers --
23 "shall be" -- not may be -- "shall be accorded in the
24 territory of the other contracting party the use on the
25

1 said routes at each of the places specified therein of
2 all the airports designated for international air services."
3 And we look at Article 3, and the first
4 route mentioned is London-New York, and the only airport
5 that has been permitted these carriers for Concorde
6 operations is JFK.
7 JFK holds itself out for international
8 air transportation. So there's no dispute that the thrust
9 and purpose of Article 1 and the annex to Article 1 is
10 to grant British Airways and Air France the right, the
11 absolute right -- "shall be accorded" is the language --
12 to fly London-New York-JFK with Concorde aircraft.
13 Article 2 says, "The agreed services" -- that
14 is London-New York with Concorde aircraft --"may be
15 inaugurated immediately but not before."
16 So it's important to see what the conditions
17 are, your Honor, because there are conditions specified.
18 "A, the contracting party has designated
19 the air carrier." Stipulated.
20 "B, the contracting party granting the rights
21 has granted operating permission." Stipulated.
22 Subject to the provisions of Paragraph 2
23 and Article 6. Article 2 says, "The designated air carrier"
24 that's the British Airways, "may be required to satisfy
25

1 the aeronautical authorities of the contracting party."

2 Who are the aeronautical authorities? It's

3 not left to doubt.

4 Article 12 says, "The term aeronautical

5 authorities shall mean in the United States, the Civil

6 Aeronautics Board and any person or body authorized to

7 perform the functions presently exercised by the Board,

8 not the Port Authority."

9 Those aeronautical authorities in this case

10 pursuant to that article applied laws and regulations

11 normally applied to the operation of commercial air

12 carriers.

13 What did they do? We have seen what they

14 have done. They have granted full authorization.

15 So Article 2 is satisfied.

16 What does Article 6 says, which is the other

17 article cited in the basic grant provisions of the

18 treaty?

19 Article 6 says, and this is the heart of

20 the agreement, your Honor -- Article 6 says:

21 "Each contracting party reserves the right

22 to withhold or revoke the exercise of the rights specified

23 in the annex for three different reasons."

24 "Number one, the contracting party is not

25

satisfied that there is an appropriate ownership." We have gone through that. The C.A.B. has attested to the ownership.

"Number 2, miscellaneous conditions which the carriers cannot meet." No claim of that.

"Number 3, or in case of failure by the carrier to comply with the laws and regulations referred to in Article 5."

So here we have a situation, your Honor, where the rights are granted, the carriers have fulfilled all the rights and the treaty says, but the contracting party, the United States, Britain, France, not the Port Authority, reserves the right to withhold or revoke. No one has withheld. We have the Operations Specifications, we have the permit, we have the orders, we have too many permissions. All we need is to land at JFK. So nothing has been withheld.

It is who has the power, your Honor, at this time to revoke? That is the issue, your Honor.

Under Article 6, who has the power to revoke for what reasons?

Article 6 refers to Article 5. Article 5 says, "The laws and regulations of the contracting party relating to entry, departure, navigation and operations

shall apply to the aircraft of the other contracting party."

The Port Authority's argument is that we have a law or regulation here. Our resolution, and you haven't met it yet. Therefore, we are withholding, we are revoking, we are not giving, we don't want you.

I don't know what the resolution says, your Honor, but that resolution is not a law. Certainly no one will debate the fact with me that is not a law. Is it a regulation? Is it of general applicability? Is there a way for the carriers to meet it?

Your Honor, we have been trying. We come here with heavy hearts. We don't know why we can't meet that regulation. We can't meet the regulation because there's nothing to meet. They want a study. They have been studying, your Honor.

But even if that resolution were a regulation, then who has the power to enforce it?

Did the United States enter into 150 agreements and somehow carve out a niche for every Port Authority in this country to say: Well, you have done a good job, Secretary Coleman. You have looked at everything, but we want more time. We have to look at the noise characteristics around New York. You have only looked at the noise

1 characteristics of the Concorde in the context of the
2 United States.
3 Your Honor, the position taken by the Port
4 Authority undermines the very rights that are granted by
5 this agreement and 150 others like it.
6 There is no way, there is no way for the
7 United States to go to its trading partners in the world
8 and say: We will grant you authority to fly into our
9 country, but watch out for those local airport proprietors.
10 International air transportation has a special body of
11 law that permits any airport proprietor to adopt any
12 regulation to keep you out. Your wheels are too big,
13 your windows are green, your pilots weigh too much.
14 That's being facetious, your Honor.
15 I must say that the resolution of this Port
16 Authority is so out of keeping with what the parties
17 understood they were obtaining and agreeing to in these
18 agreements as to merit that kind of extension by hyperbole.
19 So we come, your Honor, to the end of the
20 treaty.
21 I haven't heard any arguments against the
22 treaty. Maybe the treaty is something you just put in
23 the back drawer and you say: Well, it's just a treaty,
24 there are more important issues, there's preemption.
25

Your Honor, these rights have vested, the facts have been stipulated.

THE COURT: What did the Secretary of Transportation say about this argument that you make on the treaty?

MR. NICKLES: Your Honor, the Secretary of Transportation at pages 10 and 11 of his decision said -- I think he said what I have just said, starting at page 10. He said that Article 2 provides, and he quotes it and then he quotes the other agreement. He's talking now about Article 2, your Honor, not about Article 5 which you will hear the Port Authority come back to.

Article 2. He says, "Pursuant to these reservations of authority the Civil Aeronautics Board has certain authority," and he goes on at the bottom of page 10, "And the FAA has certain authority," and at page 11 it is these provisions, these provisions, Article 2, not the Article 5, these provisions of the international agreements, the Bermuda and Paris Agreements, that reserve to the United States, to the United States, not to the Port Authority, to the United States, the authority to deny the Concorde permission to land all together or to place restrictions on Corcorde operations, and unrestricted permission to operate would be inconsistent with the policies

1 expressed in the environmental laws of the United States.

2 In the very next paragraph, your Honor, once

3 again these provisions, Article 2, and the sense of justice

4 as well demand that the laws of this country be applied

5 fairly and without discrimination. That is what has

6 happened, your Honor.

7 Secretary Coleman, and he refers to Article

8 11, your Honor, of the Chicago Convention. He goes

9 through the same discussion that I have gone through.

10 THE COURT: Did the Secretary conclude

11 that he was compelled by these treaties and agreements to

12 authorize admission of the Concorde?

13 MR. NICKLES: No, your Honor.

14 THE COURT: Since he had the powers that

15 you ascribe to him and since he considered this very

16 subject matter and did not reach a conclusion that the

17 bilaterals required him to admit the Concorde on those

18 grounds, how does that leave it for the Court?

19 MR. NICKLES: Your Honor, Secretary Coleman

20 took the position that the United States must determine

21 through his office, as the Cabinet member in charge of

22 Transportation, whether it would be consistent with the

23 environmental laws of the United States, as he said, to

24 admit the Concorde.

25

Secretary Coleman said: I have decided to admit the Concorde. He said to the FAA, as your Honor pointed out at the start of the argument, "Amend the Operations Specifications."

As you will see, the Operations Specifications say British Airways, Air France, you have two flights a day into JFK Airport.

THE COURT: Where does he use the words "I direct that they land" instead of "I authorize them to do so"?

MR. NICKLES: Your Honor, because as a technical matter, under the Department of Transportation Act, the technical question of the actual authority to issue operating specifications is in the FAA. So it was the FAA that had technically to issue the operating specifications.

Secretary Coleman, your Honor, took the position that he could have said no. He could have said no to Concorde. But we are here today because he said yes.

Your Honor, on the foreign regulations argument, we have dealt with that in our brief. Suffice it to say that the governments involved have submitted an amici brief. I am sure that particular matter has been

1 reported in the press.

2 There's no secret that the governments

3 involved have been frustrated and consider this matter

4 to be of extreme importance.

5 Under the case that we have cited, your Honor,

6 on the alternative ground, that the Port Authority's

7 action unduly disrupts the foreign regulations of the

8 United States, we would ask the Court to declare void and

9 of no effect the resolution of the Port Authority.

10 THE COURT: Have you sought any evidence

11 from the Secretary of State that the foreign relations

12 are about to be disrupted because of this local order?

13 MR. NICKLES: Well, your Honor, the govern-

14 ments of each of the nations have been, I think it's fair

15 to say, as I have read from the paper -- I'm not a party

16 to those high level discussions, your Honor -- there's

17 been very frequent consultation between the governments

18 as to the manner in which the French and British view

19 the matter.

20 I think your Honor could take judicial

21 notice of the fact that the new administration has come

22 in, reviewed the case and affirmed through the Carter

23 administration the Operations Specifications. There's

24 been no change in the decision or order.

25

We have as an exhibit, your Honor, the letter of Former Secretary of State, Secretary Kissinger, which is part of the record.

THE COURT: I thought the President of the United States when questioned about this, according to the press, said he passed it back to the Port Authority.

MR. NICKLES: Your Honor, I think everyone is passing it back to you.

Your Honor, I think it's fair to say that the Federal Government has said: We have given them all the authorization we can give them and that's conceded by the Port Authority. I am not keeping any secrets, your Honor, when I say that this is a hot issue. I think sometimes it's the obligation and function of the independent judiciary to meet those hot issues, and I think your Honor is fortunate to be privileged to do that in this case.

THE COURT: You mean in the words of a late president, the buck stops here?

MR. NICKLES: Absolutely, your Honor.

THE COURT: Isn't it true that I am not being asked to decide whether the noise level of the Concorde is tolerable or not acceptable nor whether the aircraft should or should not be given a chance to prove itself?

MR. NICKLES: Absolutely, your Honor. I think, as you said --

THE COURT: If that is so, who is going to decide it as long as the contending parties are passing it around among each other and to me?

MR. NICKLES: Your Honor, once you decide it, and obviously our views on how you should decide it have been made clear, the Concorde will then land at JFK and we'll see what it can do, just as we have been seeing what it can do at Dulles for the last twelve months.

I submit it will meet all regulations. I submit it will not be the monster that some people think it is. If there is a problem, then it is the FAA and the C.A.B. and the Federal Government that is authorized under Article 8 to revoke, to revoke.

We are not saying, your Honor, that if this airplane turns out to crash all the runways and all the rest --

THE COURT: That really gets off your point of international treaties and obligations, doesn't it? Why don't you leave that for the Port Authority to explain.

MR. NICKLES: Thank you, your Honor.

THE COURT: All right.

Mr. Wells, who is next on the agenda?

MR. NICKLES: I think Mr. Wells is next.

THE COURT: I don't know whether this question should be addressed to Mr. Nickles or to Mr. Wells, but I would like to throw out the question:

Is the only remedy for violation of the Chicago Convention a resort to the arbitration clause?

MR. NICKLES: Your Honor, could I --

THE COURT: Is that in your bailiwick?

MR. NICKLES: Let me try to answer it.

Your Honor, if there were to be a dispute between the parties, and there is none at this time, as to the interpretation of the articles pertinent to this issue, there are provisions for arbitrations. There is no dispute at this time, that is the key point that I would make to the Court, either under the Chicago Convention or under the Bermuda or Paris Agreements.

THE COURT: When you say "There is no dispute," you mean the foreign airlines and the foreign governments are not in dispute with the Federal Government here?

MR. NICKLES: That's right. That is the only kind of dispute that triggers the arbitration provisions. The United States can do it or the British or French could do it, either party.

THE COURT: Couldn't you get a declaratory

1 judgment from the arbitrator?

2 MR. NICKLES: I am not an expert in

3 arbitration law, your Honor. My feeling is that we are

4 much happier dealing with the Federal Government because

5 there is no dispute between the United States and the

6 foreign governments.

7 THE COURT: All right, Mr. Wells.

8 MR. WELLS: Your Honor, as I stated before,

9 I am going to deal with the preemption point, preemption,

10 of course, being the assumption by the United States of

11 powers which otherwise could be exercised by the States

12 or their political subdivisions.

13 When the United States has acted under the

14 supremacy clause, Article 6, Section 2 of the Constitution,

15 the Federal Government has the last word.

16 The airlines' position here --

17 THE COURT: What you are saying is that we

18 should not fight the Civil War again.

19 MR. WELLS: Yes, sir.

20 The airlines' position here is, first, that

21 the Federal Government has totally preempted the regulation

22 of aircraft flight operations and air space management.

23 THE COURT: How did they do that?

24 MR. WELLS: They did that through a scheme

25

1 gwjw 19

2 of Congressional actions, Congressional statutes over a

3 period of time. Your Honor asked us for our citations

4 on this in your letter of February 22, 1977, and you

5 asked us that we specify the statutes and regulations

6 in support of our statement, and I quote the statement

7 now:

8 "That the Federal Government has totally

9 preempted the field of regulation of aircraft flight

10 operations and air space management and that appropriate

11 federal agencies may in their discretion preempt any

12 actions by local airport proprietors that conflict with

13 FAA statutory regulatory authority."

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2 We answered your letter with our letter of
3 March 4, 1977 together with exhibits and set those out
4 at some length.

5 When the statutory scheme adopted by Congress
6 over the years is examined it becomes clear the Congress
7 has spread the tent of federal control over every aspect
8 of aircraft flight operations and air space planning.

9 In Exhibit 1 attached to our letter of March
10 4, 1977 we set out, as I said, in 16 pages, various pro-
11 visions of the Federal Aviation Act of 1958, the Department
12 of Transportation Act of 1968 and the Noise Control Act of
13 1972 and references to applicable rules and regulations
14 issued by the FAA.

15 In a pretrial conference your Honor inquired
16 as to the contribution to coverage, if any, of the Airport
17 and Airway Development Acts of 1970 and 1976 and
18 earlier. We looked into those and we do not believe that
19 those Airport and Airway Development Acts are directly
20 pertinent to our case, but we do say that those acts show
21 the increasing federal involvement in the development
22 and control of local airports as part of our national
23 aviation system.

24 The federal preemption, and this is preemption
25 over the operation of aircraft in the United States, is

one example, perhaps the leading example. Federal preemption of the regulation that I have been talking about has developed through a step by step process over a period of years.

Although the Federal Government has long recognized, since 1938, at the latest since 1938, the national character of commercial air transportation, federal controls have lagged behind the needs engendered by the technological developments in the airplane industry and the increasing volume, the ever-increasing volume of air traffic.

During this period of development proprietary and public airports have filled gaps, necessarily filled gaps in federal controls, but as Congress passed further regulation which was called for by the regulatory scheme which was developing, the federal controls moved in and the local controls moved out until now we get total coverage.

To decide the issue here presented it is necessary to determine, as I said briefly before and as Mr. Nickles said before, precisely what Secretary Coleman did in his February 4, 1976 decision and order. I will try to shorten this a bit, your Honor, but pages 3 and 4 of the decision, of the Secretary's decision,

1 eorf 3

2 and that is Exhibit A to the moving papers herein, pages
3 3 and 4 set this out in detail.

4 He says, "I have decided for the reasons set
5 forth below to permit British Airways and Air France
6 to conduct limited scheduled commercial flights into the
7 United States for a trial period not to exceed 16 months
8 under limitations and restrictions set forth below.

9 "Thus directing the Federal Aviation Administrator,
10 subject to any additional requirements he would impose
11 for safety reasons or other concerns within his jurisdiction,
12 to order provisional amendment of the Operations
13 Specifications of British Airways and Air France," et
14 cetera.

15 "These amendments may be revoked at any time
16 upon four months' notice or immediately in the event of
17 an emergency deemed harmful to the health, welfare or
18 safety of the American people."

19 Then he lays down additional terms and
20 conditions which are precise and which apply precisely to
21 the operation of Concorde at JFK.

22 "1. No flight may be scheduled for landing or
23 takeoff in the United States before 7:00 a.m. local time
24 or after 10:00 p.m. local time."

25 That means that the Secretary himself is laying

1 eorf 4

2 down the curfew for Concorde operations there.

3 "2. Except where weather or other temporary

4 emergency conditions dictate otherwise, the flights

5 of British Airways must originate from Heathrow and those" --

6 I am collapsing a little bit -- "and those of Air France

7 must originate from Charles deGaulle.

8 "3. Authorization of any commercial flights,

9 in addition to those specifically permitted by this action,

10 shall constitute a new major federal action within the

11 terms of NEPA."

12 That is part of the retention of controlling

13 by the Department of Transportation and the FAA.

14 "4. In accordance with FAA regulations the

15 Concorde may not fly at supersonic speed over the United

16 States or any of its territories."

17 That was as noted pursuant to the regulations

18 previously issued.

19 "5. The FAA is authorized to impose such

20 additional noise abatement procedures as are safe,

21 technologically feasible, economically justified and

22 necessary to minimize the noise impact including but not

23 limited to the thrust cutback on departure."

24 That retains to the Federal Government all

25 the variations in the operation of Concorde in and out of

1 eorf 5

2 JFK. It leaves nothing for the Port Authority except
3 ministerial matters on the ground.
4 Then the Secretary goes on to state other things
5 that should take place during this trial operation period.
6 Going over to page 61, as I previously noted,
7 he ended up by ordering the FAA to amend the Operations
8 Specifications pursuant to the conditions he had laid
9 down in paragraphs 3 and 4.
10 Of course, there is a lot of area covered
11 between pages 3 and 4 and pages 61 in the Secretary's
12 single paged opinion. That is a hefty piece of reading.
13 One of the Secretary's
14 purposes in ordering a demonstration period was to gather
15 factual evidence which would be necessary for future
16 decision-making. In other words, there was a general
17 purpose which the Government required in addition to order-
18 ing the specific operation.
19 He noted that the Secretary -- Secretary Coleman
20 noted that he was charged with "Development of international
21 transport policies and programs conducive to the provision
22 of fast, safe, efficient and convenient transportation."
23 That is at page 13 of his decision.
24 Despite the large amount of material available
25 to him in the Environmental Impact Statement, he stated

1 eorf 6

2 that a demonstration period was also necessary to
3 develop further information on subjective reactions to
4 noise, this is page 58 and also 59, and subjective
5 reactions to noise is one of the things that the Port
6 Authority purported to cover in its resolution, and also,
7 the Secretary said, to develop further information on the
8 actual noise impact.

9 Secretary Coleman noted that these facts would
10 be useful both in connection with future Concorde operations
11 and in preparation of noise standards for SSTs generally.

12 The Secretary said that the demonstration
13 period would permit evaluation of the comparative fuel
14 efficiency of the aircraft, the demand for supersonic
15 passenger service and, in particular, whether sufficient
16 demand exists to support or encourage development of
17 cleaner, quieter, second generation aircraft.

18 Further, evidence to supplement the scientific
19 speculation as to climatic and ozone layer changes.

20 In other words, there were very important
21 national purposes to be served by having this trial or
22 demonstration period for the Concorde. The United States had
23 substantial educational and future technological interests
24 in having this trial period made at the expense of two
25 friendly governments, an expense of some $3 billion.

In any case, Secretary Coleman's decision is clear and unambiguous by its terms. We submit that full federal preemptions of the operation of Concorde at JFK with respect to noise, safety and the other relevant factors considered by the Secretary was specifically exercised by his decision and order.

Pursuant to Secretary Coleman's order and without any reference to prior federal policy or the PA position, the FAA on April 2, 1976, issued its amended Operations Specifications to British Airways and Air France to operate the Concorde at JFK.

This was, of course, as Mr. Nickles explained, the technical implementation of Secretary Coleman's order.

If your Honor will refer to the briefing books, Tab 2, and just run down -- I will just draw certain items to your attention. On page 3, paragraph A-1, note the specific authorization, "To conduct two Concorde flights a day to and from John F. Kennedy International Airport."

This we say was a direct and explicit order. The Port Authority cannot say no.

Second. At paragraph A-5, there are specified certain times of the day during which the Concorde cannot land or take off.

In other words, the Secretary laid down the federal curfew and the Port Authority has no authority there at all.

Thirdly, in paragraphs A-3 and A-7, there is reserved to the FAA the right to "Modify these conditions and the procedures," or "impose such additional noise abatement procedures as are safe,technologically feasible, economically justified and necessary to minimize the noise impact."

In other words, the FAA retained the power to amend these controls, extend them and change them. That eliminated any arguable implied authorization to the airport to itself impose any controls.

Paragraph B of the specifications is captioned "Noise Abatement Departure Procedures, John F. Kennedy International Airport."

This specifies in detail the flight track, the turns and power applications which the FAA found to be appropriate for noise abatement.

Thus the Operations Specifications, which implement the Secretary's decision and order, contain specific and detailed noise abatement procedures and other conditions which have been settled on by the Federal Government after exhaustive proceedings and reserved the power

1 eorf 9

2 for future action to the FAA.

3 This leaves no room for the Port Authority,

4 except as I said before, some ministerial and servicing

5 operations on the ground.

6 The Port Authority urges that the Secretary's

7 footnote, and I direct your Honor to page 3 of the decision,

8 that the Secretary's footnote on page 3 of his decision

9 and order states the general federal policy then obtaining

10 and that the Secretary thereby acquiesced in a temporary

11 ban by the Port Authority.

12 That is at page 45 of his main brief.

13 There is no merit to any such contention. At

14 most, the Secretary acknowledged, as a careful Philadelphia

15 lawyer would, the fact that there had been a prior general

16 policy by the Federal Government which allowed local controls

17 unless those controls were barred by federal controls.

18 The Secretary said in this footnote, if there

19 is "Any legitimate and legally binding reason that the

20 JFK part of the demonstration could not go forward,

21 that would be unfortunate," et cetera.

22 This was a prefatory utterance.

23 He did not say -- he did not say Port

24 Authority -- this is my recommendation or I am issuing this

25 decision and order. You can obey it or not as you see fit.

He definitely did not say that. If you read that 61 pages and you read the specs which implement it, there just is no way you can get a saving of authority for the Port Authority out of that decision and opinion.

Questions came up about this footnote particularely after the lawsuit was started on March 17th and the Secretary issued a clarifying statement in the form of a release on March 24, 1976.

This is what he said in part:

"In the event, however, that the proprietors of JFK persist in their apparent decision not to participate in the demonstration until there have been six months of demonstration flights at Dulles, and in the further event that this decision is upheld in court; we will welcome the participation at JFK," et cetera.

We come right back to where Mr. Nickles left you before. In other words, what the Secretary was saying is that there may be a question here and this will end up in court --

THE COURT: Do you think he was beginning to read the election returns?

MR. WELLS: I think you may be correct, your Honor. I don't think that anybody who has taken a position on this, except for Secretary Coleman, has done anything

less than consider the next election or his political position and his political image.

THE COURT: In other words, you think it is just language of diplomacy by the Secretary. His direction is on page 61 of his order where he said, "I order."

MR. WELLS: Yes, sir.

THE COURT: You think he meant, "I order."

MR. WELLS: That is right. You know, when the federals are dealing with the states and the subdivisions, they always try to make it appear as a matter of policy.

THE COURT: Courtesy.

MR. WELLS: We are friends, we are working together and we need your cooperation, you are very important in this operation, they are all hoping they will get a little extra effort and a little extra local money.

THE COURT: Is that re the question of fact I am to decide as to whether they mean it positively when they say, "I order "?

MR. WELLS: No, I don't think that is a question of fact.

THE COURT: This is a motion here on summary judgment. I am not supposed to delve into the facts.

1 I am supposed to be guided by admitted facts or conceded
2 facts or immutable facts.
3 MR. WELLS: I haven't argued from anything here,
4 your Honor, that isn't in the record. We have conceded
5 that there is no factual dispute.
6 THE COURT: I am raising the question with you
7 as to whether or not there is an ambiguity that has
8 been presented here and with dueapologies to both counsel,
9 who insist that there is no issue of fact, I am just themselves
10 wondering whether each of you is not raising an issue of
11 controvertible fact.
12 MR. WELLS: We are not raising it and we
13 won't pay any attention to it, but the Port Authority and
14 the amicae have raised it. We say it is not an issue
15 of fact.
16 THE COURT: The Port Authority has put it
17 solidly on record in their brief saying there are no
18 factual disputes. They are very clear. They say to the
19 federal authorities, if you have directed us to do this,
20 we are cancelling your direction.
21 Isn't that about the net of it?
22 MR. WELLS: Would you say that again, your
23 Honor?
24 THE COURT: If the Federal Government has
25

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directed us to allow scheduled commercial flights on a tryout basis for a period limited as indicated in the order, then we are cancelling that out until we have a look at the things that you have been looking at.

MR. WELLS: Well, that is what they are saying, but we don't think that is a direct statement.

THE COURT: You think that that results in a straight out and out clash of whether there is or is not federal supremacy.

MR. WELLS: There is a straight out and out clash with respect to how you interpret Secretary Coleman's order and we say --

THE COURT: His words were very clear. He said, "I order."

MR. WELLS: That is correct. He didn't take it away --

THE COURT: He didn't add the words "I order positively."

MR. WELLS: If your Honor will pardon me, we think he did say exactly that. I order, order, order, and the FAA went out and they treated it as an order and there were no ifs, ands or buts about the action they took.

THE COURT: Of course, there is always the

1 question as to who writes footnotes to a decision, you
2 know.
3 MR. WELLS: That is an interesting point.
4 THE COURT: You know the old story about the
5 late Judge Frank who used to say, "I will write the opinion
6 and let my clerks write the footnotes."
7 MR. WELLS: That gave away half the battle.
8 THE COURT: He always insisted that what he said
9 up in front was what he ordered.
10 MR. WELLS: And I agree with that wholeheartedly.
11 I think that applies right here.
12 Now, the Port Authority's argument in its
13 supplemental memorandum, that is the memorandum they
14 filed with this Court on January 7, 1977 is limited --
15 it is very short, sweet and to the point -- and it is
16 limited to comments on the text and the effect of the avia-
17 tion noise abatement policy statement, which had been issued
18 by the Secretary of Transportation and the FAA on November
19 18, 1976.
20 In order not to say aviation noise abatement
21 policy, I will call it ANAP. ANAP was issued with relation
22 to a proposed amended FAA rule relating to noise at airports
23 and had a lot of good general language in there about
24 the needs and desires of reducing noise, which are mostly
25

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2 beside the point.

3 The Port Authority seizes on this and says that

4 ANAP empowers the proprietary airport operators to

5 impose airport noise restrictions, including a ban on noisy

6 aircraft, but we say that that just isn't relevant to

7 this case. They are talking about another case.

8 ANAP has no bearing whatever on the rights

9 at JFK which had been specifically granted to the airlines.

10 There is no reference in it to the Concorde, but there is

11 recognition that existing noise standards do not apply

12 to SSTs, ANAP is another type of argument that is made

13 upon the basis of the Secretary's footnote and his release

14 of March 24, 1976.

15 ANAP does affirm that the Federal Government

16 has totally preempted the field of regulation, of

17 aircraft flight operations and air space management and

18 states that appropriate federal agencies may in their dis-

19 cretion preempt any actions by local airport proprietors

20 "that conflict with FAA statutory regulatory authority."

21 See page 59 of ANAP and also page 33.

22 ANAP does not and cannot add anything to the

23 Port Authority's assertion of power in this case.

24 In our case the Federal Government's general policy

25 with respect to noise controls by proprietary airports

1 does not apply. That is the general policy that if we
2 haven't acted, fellas, you can act at your airport.
3 Here the Federal Government has issued a specific and
4 detailed order with respect to a specific type of plane,
5 the Concorde, in a specific airport, JFK.
6 Now we go on to another one of the Port Authority's
7 arguments and also put forth by the amicae and that is that
8 since an airport proprietor may be liable for the noise
9 occasioned by the aircraft's use of the airport,
10 the airport must necessarily have control over the
11 airport usage despite specific federal decisions relating
12 to noise promulgated pursuant to the authority of Congress.
13 Of course, this just doesn't wash. The brief
14 amicus of the State of California states his position
15 in baldest terms. There they come right out and say:
16 "The issue of liability for aircraft noise
17 and the authority to diminish that liability by diminishing
18 that noise are inextricably intertwined. Who is liable
19 is he who can control."
20 The error in the argument, of course, is the
21 assertion that controlling follows from liability.
22 Actually, the truth is just the reverse. Liability
23 follows from control.
24 Everybody talks about the Griggs case. That
25

1 is a famous case which is apparently the only authority
2 which is cited for this proposition. That was at 369 U.S. 84
3 and decided in 1962.
4 The Port Authority in discussing that case
5 in effect stands the case on its head. There Mr.
6 Justice Douglas was writing for the majority and he held
7 that Allegheny County, the airport proprietor, was liable
8 for just compensation under the 14th Amendment because of
9 a taking of a neighbor's house by reason of the airplane's
10 coming in for a landing 25 or 50 feet above the top of
11 the house.
12 But in the circumstances of that case it is
13 very clear that the airport had control. The Federal
14 Government didn't have control. The only federal control
15 that was visible was the fact they had put up money to
16 contribute to the airport and had approved the plans
17 that were brought down by the Allegheny County authorities.
18 Mr. Justice Black wrote a vigorous dissent and
19 I don't know whether it was unusual or not, but he was
20 joined by that great jurist Mr. Justice Frankfurter. They
21 said that Allegheny County had not taken the house owner's
22 property but that the United States had.
23 In any case, Griggs itself nowhere suggest that
24 possible liability establishes a right to control aircraft
25

1 operation. On the contrary, the remedy suggested by the
2 Court in that case was that the airport authority should
3 go out and condemn additional lands so as to clear up the
4 air easement.
5 Another aspect of Griggs which the Port
6 Authority does not mention, which makes a substantial
7 difference, is that unlike today, prior to 1968, there
8 was no federal legislation specifically directed to
9 aircraft or airport noise, nor was there any specific
10 federal decision relating to use of airport by particular
11 aircraft.
12 A hindsight view of Griggs, which I submit is
13 justified, is that if the Federal Government had before
14 Griggs clearly preempted control of aircraft noise,
15 Mr. Justice Black's dissent would have led the majority
16 and Allegheny County would not have been held liable to
17 Mr. Griggs. That result would be even clearer if the
18 Secretary of Transportation or the authority in those
19 days and the FAA, under authority conferred by Congressional
20 statute, had directed that the planes must follow the
21 flight path which passed 50 feet over Mr. Grigg's house.
22 In an earlier phase of this litigation this
23 court suggested a point which is in accord with this
24 view of Griggs and that is that it is altogether possible
25

that an airport proprietor, acting under the direction of the federal authorities, may be immune from such liability, and we think that is correct. We think that Farmers Union against WDAY is a close enough analogy to supply authority for that proposition and whether you proceed upon the basis of agency or Federal Government coercion or domination or direction, I don't see how the unwilling instrument, in this case the Port Authority, who goes along and performs under Coleman's decision and order, I don't see how they can be held liable.

In any event, the Griggs type issue does not really arise here since nobody claims that the Concorde will necessarily or even probably result in a taking of anybody's private property.

They have a very big air space out there and the precise noise abatement procedures and the runways, which are directed to be used, the safety turn of 25 degrees and so on and so forth are not, and this isn't a factual question, your Honor, I don't want to get trapped into that again, but on the record I think the Court can see no possibility of any successful suit by a neighbor of JFK.

Now, the Secretary found that Concorde flights would have "relatively little effect" in that

1 eorf 20

2 environment. He spent five pages in his decision, 45 to 50,
3 to discuss that. It seems to me that that is absolutely
4 clear when you consider that these few flights a day of
5 Concorde in and out during business hours would add in
6 only a minuscule way to the air traffic now there. It is
7 in the record that over 1,000 flights a day come in and
8 out of JFK.

9 THE COURT: Do you think that all of the opposi-
10 tion to the Concorde is opposition to the airport
11 rather than to the plane itself?

12 MR. WELLS: Absolutely. What the neighbors
13 of JFK are saying, and I think you can take judicial
14 notice of the fact --

15 THE COURT: About 20 years ago that area was
16 a bog down there and a morass, wasn't it?

17 MR. WELLS: That is correct.

18 THE COURT: A lot of people moved into it
19 knowing it was JFK.

20 MR. WELL:S Robert Moses discovered JFK
21 out there in the bullrushes. I apologize, that was
22 unwitting.

23 When all the people out there are objecting,
24 sure they object. They don't like the noise and you can't
25 blame a person for stating his own reaction to the

encroachment of civilization. But we have to live with it.

To sum up, your Honor, I can understand and I sympathize and our clients understand and sympathize with the people who live in the vicinity of JFK, the 485,000 who live within the noise chute.

The assorted noises of more than 1,000 planes a day landing and taking off obviously is not pleasant, but travelers, traffic, trucking and a myriad of other noises are essential to making a living and living in a metropolitan area. There is no way you can get away from it. You can't have it both ways. You can't be part of the great Apple and have things nice and quiet, not unless you wear earplugs.

The Federal Government has here preempted the aviation area in issue and has ordered that a few Concordes should be allowed to land and take off each day for a limited trial period and upon certain narrow and specific terms and conditions.

The Port Authority insists that it may refuse to follow these orders and that it will hold its own meetings, conduct its own studies, and make its own determination.

The political pressures and activities of its neighbors at JFK make it fairly obvious that a fair and unprejudiced decision which considers all the facts and factors here relevant from a national point of view just is not going to be conducted by the Port Authority.

When Secretary Coleman considered the obligations of the United States under the bilateral treaties and the international interests of the United States, as well as his nationwide and worldwide responsibilities for transportation which is safe, fast, efficient and environmentally sound, the Port Authority necessarily must emphasize noise, and the subjective reactions of the residents near JFK.

This is a type of home rule which is not in the national interest. If the Port Authority can do this,

1 any proprietary airport in the country can do it. Local
2 interests, not national interests, will become the guiding
3 rule.
4 The air transportation system of the United
5 States, which has largely replaced the railroads, and
6 together with the automobile is our sole method of getting
7 around in a hurry, will be reduced to chaos. National
8 control is absolutely essential on national issues.
9 This is the reason for the supremacy clause
10 in the Constitution. This is the reason, your Honor, for
11 the preemption pattern established by Congress over a
12 period of years. This is the reason for the federal
13 decisions and implementing regulations at the national level.
14 And last but not least, this is a prime reason for an
15 independent federal judiciary. Thank you very much.
16 THE COURT: I have a few questions that I
17 would like to ask you before we recess for a breather,
18 and then we will hear the Port Authority.
19 Were the airlines clearly advised that they
20 would need Port Authority permission to land even after
21 Secretary Coleman decided whatever he was going to decide?
22 MR. WELLS: Will you say that again, sir?
23 THE COURT: Read it.
24 (Record read)
25

MR. WELLS: You mean following his decision of February 4?

THE COURT: No, not following it. Prior to the time that he made a decision, was it manifest to the airlines that they would need Port Authority permission to land?

MR. WELLS: To my knowledge, your Honor, that suggestion was never made directly or indirectly at any time. Now, I can't speak for everybody, whoever talked to anybody in Washington, but I have never heard that any such suggestion was made, and I ask Mr. Nickles whether --

MR. NICKLES: Your Honor, the only reference which is made in the Port Authority brief is to the impact statement. But there was, as far as we know, no explicit or implicit suggestion at any time by the federal authorities to the airlines that this is just Phase 1. You get our authority and then you go to the Port Authority. Absolutely not.

THE COURT: Next question. Has there been any attempt by the airlines to obtain clarification or intervention of the Secretary of Transportation or the Federal Administrator in this controversy?

MR. WELLS: I believe that there was, your Honor. Now, you asked me in January whether the Department

of State and/or the Department of Transportation was going to file briefs amici or do something else with respect to this litigation. I said that it was not my province, it was not within the area of my responsibility in this full, broad picture to deal with either one of those government departments or indeed the White House.

THE COURT: Nobody has approached the Secretary of Transportation to find out whether he meant his order positively?

MR. WELLS: Well, so far as I know, every time there was any conversation with anybody over there, it was very clear that they regarded this as an order positively. After all, the Department of Transportation had to go to court a few times in order to defend what the Secretary had done.

THE COURT: Has the Secretary of Transportation or the Federal Administrator promulgated noise regulations under the Noise Abatement Act?

MR. WELLS: As regards the Concorde?

THE COURT: As regards supersonic aircraft.

MR. WELLS: I think Mr. Nickles, who is more clearly part of the scene at Washington, could answer these better than I can.

THE COURT: All right. We will ask Mr. Nickles.

MR. NICKLES: Your Honor, let me say that, with respect to the prior question about obtaining the intervention of the federal authorities, we have supplied their lawyers with copies of the papers, and my own surmise is that, having seen, for example, in item 7 where we state as a material fact which is undisputed that the Secretary ordered certain things to be done and that they were done, and where the Port Authority says at page 40 there is no question about federal authorization, and at page 16 says that, "No triable issue of fact exists," that there was no need for clarification.

As to the question whether the federal authorities have issued noise regulations on Concorde, the Aviation Noise Abatement Policy Statement, your Honor, indicates -- and I will get that specifically to you -- this was issued in November, your Honor. The Department said at page 8 that "no later than 30 days after the conclusion of the 16-month demonstration program, the Department would act to promulgate a noise rule applicable to supersonic aircraft that is necessary to protect the public health, welfare and consistent with the statutory requirement that the administrator consider technological practicability, economic reasonableness, and appropriateness to aircraft types."

1 So it is this very experiment that we are
2 trying to get underway which the Department of Transpor-
3 tation on November 18, 1976, indicated would form the
4 basis for the establishment of SST noise regulations under
5 Section 611 of the Federal Aviation Act.
6 THE COURT: So the answer is that there are no
7 general regulations at the present time pertaining to
8 noise abatement of supersonic aircraft.
9 MR. NICKLES: There have been no general
10 regulations promulgated under section 611, your Honor.
11 There are the specific conditions set forth in the
12 operations specifications for these particular limited
13 operations.
14 THE COURT: Now on the subject of congressional
15 intent, which the Port Authority dwells on to a large
16 degree, is it correct that in Congress the notion was that
17 noise control was left with the airport proprietor?
18 MR. NICKLES: Your Honor, I don't see that,
19 because the --
20 THE COURT: Didn't they say so specifically in
21 the reports, congressional reports?
22 MR. NICKLES: Your Honor, the reports that have
23 been cited to the Court were all reports that predated the
24 Burbank decision in 1972 and the Noise Control Act which
25

1 amended Section 611, which, as your Honor will see, sets
2 up a very complex procedure between the FAA and the EPA
3 to establish noise regulations.
4 THE COURT: Yes, but in enacting Section 611,
5 wasn't the congressional history specifically directed
6 to the question of noise control by airport proprietors?
7 MR. NICKLES: Your Honor, let me say on that
8 that the Supreme Court in the Burbank case looked
9 specifically at that question, and in a footnote which
10 has become a very famous footnote said that "We do not
11 consider here" -- based on its view, the Supreme Court's
12 view of that legislative history that has been brought to
13 your attention -- "what limits if any apply to a
14 municipality as a proprietor."
15 The Supreme Court wasn't saying an airport
16 proprietor could take steps with respect to noise. The
17 Supreme Court was saying, "We have one airport" -- and
18 this happened to be the only airport in the country that
19 was privately owned. There is preemption. It is hard
20 for me to think the Supreme Court was spending all that
21 time in the Burbank case to deal with preemption of noise
22 at one airport, the Burbank airport. The Supreme Court
23 said, I think interestingly, your Honor, in the footnote:
24 "We do not consider here what limits if any apply to a
25

1 municipality as a proprietor."

2 And I think completely beyond Burbank it has

3 been recognized in every case -- Burbank, Crotty, Haywood,

4 and recent San Diego case -- there is no question but that

5 the Federal Government has the authority to preempt, put

6 aside the question of the relative relationship between

7 the federal authorities and the local airport proprietors

8 in the area of noise. No question. Even the Aviation

9 Noise Abatement Policy states quite clearly that the

10 Federal Government has the authority under section 611

11 of the Federal Aviation Act to preempt.

12 That is exactly what has happened here, as

13 Mr. Wells and I have tried to indicate to the Court through

14 the specific decision of Secretary Coleman and the

15 operations specifications.

16 THE COURT: So far as you are concerned, is

17 there any difference between the Port Authority wearing

18 a policeman's hat or a proprietor's hat?

19 MR. NICKLES: Your Honor, this is the craziest

20 kind of law that I have ever seen, where the Port

21 Authority can put its proprietor's hat on and say, "We

22 can ban you," but take that off and put its police power

23 hat on and say, "Well, we can't use that hat."

24 If you are undermining Burbank, if you are

25

undermining the whole concept of uniformity, of preemption, you should not be able to switch hats and do as a proprietor, which you can obviously not do in your police power capacity.

THE COURT: Bearing that position in mind, what is the explanation for why the Secretary of Transportation on March 24, 1976, said that our policy still is to delegate noise control to proprietors?

MR. NICKLES: Your Honor is referring to the press release issued by the Secretary on that date, and I think the next paragraph is the critical one.

What the Federal Government is troubled by, obviously, your Honor, is the point that you made in your order denying intervention, that is, who picks up the liability if there is any noise impact? And as your Honor appropriately noted, there is a little politics being played in connection with the matter. But the fact is that when the Secretary went on to talk about the Concorde, which is the specific issue in this case, he made a specific point: "In the further event that this decision" -- that is, the decision of the Port Authority to resist Concorde -- is upheld in court. And he was, I think, fortunately for us indicating that the independent federal judiciary would consider, in the circumstances here presented, where the

1 federal authorities have canvassed the area and issued
2 an explicit decision, whether there is any room in that
3 situation.
4 THE COURT: If he had the authority, why did he
5 need a court to bail him out?
6 MR. NICKLES: Your Honor, if the Port
7 Authority would let our airplanes land, we would not have
8 to come to you. But we did not want to land airplanes
9 and have the Port Authority out there not give some
10 direction to find their hangars.
11 THE COURT: Do you way the Federal Administrator
12 claims to have general preemptive power over noise and
13 its abatement at local airports?
14 MR. NICKLEES: Absolutely, your Honor.
15 THE COURT: Where is that indicated? Where
16 does he indicate that he believes he has overriding power
17 on noise control and noise abatement?
18 MR. NICKLES: Your Honor, in the Aviation
19 Noise Abatement Policy Statement, which is the latest
20 statement from the Department of Transportation, at page 29
21 under the title "Legal Framework" -- and to some extent,
22 your Honor, we set forth the statutory citations here in
23 our letter which we addressed to the Court in response to
24 your question, the Department of Transportation in
25

1 wc

2 conjunction with the Federal Aviation Administration

3 states: "To achieve these statutory purposes" -- which

4 are the statutory purposes under Section 103 of the

5 Federal Aviation Act -- "Sections 307(a) and (c) of the

6 Federal Aviation Act provide extensive and plenary

7 authority to the FAA concerning the use and management of

8 the navigable air space and air traffic control."

9 Further down: "In legal terms the Federal

10 Government through this exercise of its constitutional

11 and statutory powers has preempted the areas of air space

12 use and management, air traffic control, and aviation

13 safety."

14 THE COURT: Does it say landing?

15 MR. NICKLES: Well, your Honor, under the

16 regulations the Federal Government has the -- I think this

17 was pointed out in Port Authority's brief, where the Port

18 Authority, as we, rely on Griggs, but it was wrongly

19 decided, the Port Authority said --

20 THE COURT: You don't expect me to tell that

21 to the Supreme Court, do you?

22 MR. NICKLES: No, I realize that, your Honor.

23 But the Port Authority points out that the regulations

24 were amended to provide -- this is, your Honor, on page 21

25 of the Port Authority's brief -- regulations and statute,

the 1958 statute, expressly provides, in defining navigable air space, the public right of freedom of transit, I quote, "Navigable air space means air space above the minimum altitudes of flight prescribed by regulations issued under this Act" -- and this is the punch line -- "and shall include air space needed to insure safety in takeoffs and landing of aircraft."

Judge Dooling in the Hempstead case years ago said the only way you regulate noise is by regulating the aircraft. It is just completely senseless to say that you can regulate noise and at the same time not regulate aircraft. And, your Honor, the Hempstead case of Judge Dooling is cited in the November 1976 statement as the law. Burbank cites it. Crotty cites it. I think Judge Dooling was right.

THE COURT: One final question. Does the Secretary of Transportation and the Federal Administrator have the right to intervene in this case if he thinks relief is due to your clients?

MR. NICKLES: Your Honor, obviously the Federal Government has a right to intervene.

THE COURT: Isn't there an express statutory provision for him to come in to protect his orders?

MR. NICKLES: Your Honor, with respect to the

Federal Government, there is both an express and a discretionary provision that will permit the Federal Government to come in here. We would be glad to have them at our side, but they have looked at our papers and seen, I think, that there is no dispute as to the fact that it ordered what it did order. And I would like to believe, your Honor, that the Federal Government believes that with the clear statement of federal authorization that this Court can find its way to make the right decision.

THE COURT: In any event, it is perfectly clear that they have the power to come in and have not come in against you?

MR. NICKLES: Absolutely.

THE COURT: We will take a five-minute recess.

MR. NICKLES: Thank you, your Honor.

(Recess)

THE COURT: Mr. Falvey.

MR. FALVEY: If it please the Court, your Honor, I think you properly can focus on whether there is any factual dispute before you and we acknowledge that there is no factual dispute.

However, I do think that Mr. Wells and his colleague have gotten into some factual matters here today. I think they are irrelevant and you will disregard them, but I think in light of the audience that I should respond with some factual material.

We are --

THE COURT: I think it is a political question.

MR. FALVEY: Well, we are accused of considering the matter in a purely political context and Mr. Wells predicts that we will not decide it on the merits.

I suggest that that is the next case. That is not today's case. I deny it and urge that you not consider it.

Secondly, we are accused of inordinate delay and foot dragging.

The press has noted that it wasn't until early this month that the British and French submitted to us revised operating procedures for Kennedy Airport, which drastically curtailed the rights that they would

have had under the strict terms of the Coleman decision.

THE COURT: What about your resolution, which didn't take into account any requirement on their part to do any revising of their application, but that you were just going to listen to the aircraft over there at Heathrow and deGaulle and Dulles and make up your mind as to whether the noise was tolerable or intolerable.

MR. FALVEY: That is correct, your Honor.

THE COURT: When did you switch to the idea that you had to coerce them into modification of their application?

MR. FALVEY: They volunteered the modification, your Honor.

THE COURT: That was not a reason for you to take more than the six months that you had carved out for yourself, was it?

MR. FALVEY: Your Honor, the six months was forced to be extended due to the lack of cooperation by the French Government.

THE COURT: Suffice to say the Port Authority has not been guilty of accelerated pace.

MR. FALVEY: Your Honor, excessive speed is not an accusation that I would make against anybody in this matter.

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THE COURT: We are living in a supersonic age, you know.

MR. FALVEY: Yes, your Honor.

If I may --

THE COURT: That point, of course, will not be decisive.

MR. FALVEY: If I may, your Honor, I would like to go back to certain of the questions that you put to Mr. Nickles because I think they were quite penetrating and probing.

One of the questions was whether or not the airlines were told that Port Authority's permission was required.

I think you got a somewhat equivocal answer. Hopefully I can give you a direct answer and I will do so by referring to the Environmental Impact Statement itself, which is quoted at pages 46, 47 and 48 of our brief.

I don't think the language could be any more clear than what I will read from the final Environmental Impact Statement, which was the underpinning of Secretary Coleman's decision.

I am quoting:

"Prior to the conduct of any route proven

flights with the initiation of regularly scheduled commercial operation of Concorde, the operator of the aircraft," -- namely the airlines here -- "must obtain the necessary authorization from the operator of the specific airport involved."

Continuing the quote:

"The Port Authority of New York and New Jersey has a long-standing noise limit at JFK of 112 PNdB at specific locations under departure paths."

I don't know what could be more clear than that in the way of notice to the airlines that they had to obtain our permission.

There has been a lot of discussion about the statement of facts here with emphasis on the term "order".

If you will look at Secretary Coleman's decision carefully, as I am sure you have already done, you will find that the order he issues is not directed to the Port Authority, it was directed to the Federal Aviation Administration to do two things: To amend the operating specifications and to admit the Concorde to Dulles. He could do the latter because Dulles is operated by the national government.

With respect to the Port Authority, what he

said, in effect, was that, I can't give any such order to the Port Authority because it has been federal policy hitherto, said he in his decision, that the local airport operator can adopt and enforce noise regulations.

THE COURT: You think that all of his references in his 61-page opinion to JFK was surplusage?

MR. FALVEY: No, your Honor, I do not.

THE COURT: Didn't he say right in there, I have decided to permit two landings a day for each of these airlines at JFK?

MR. FALVEY: Yes, he did. He decided to permit it --

THE COURT: What does the word "permit" mean? Does that mean permit if it pleases the Port Authority?

MR. FALVEY: No, your Honor, I think it certainly does not mean order the Port Authority particularly when you include in the context --

THE COURT: Isn't the JFK a federally licensed airport?

MR. FALVEY: It is federally licensed.

THE COURT: And when the federal authorities say, "I have decided to permit landings of -- commercially scheduled landings as a test matter at a licensed airport,"

1 isn't that a sufficient indication in ordinary English
2 to say, "That is the way it's going to be"?
3 MR. FALVEY: Your Honor, even if I so read
4 the order, I would urge that any such order would be
5 contrary to congressional statutes and congressional
6 intent involved here.
7 THE COURT: I would like to have you
8 develop that and develop particularly the point as to
9 whether or not the Congress gave overall authority in
10 aviation matters and noise control and noise abatement
11 matters to the Secretary of Transportation and the Federal
12 Aviation Authority and Administrator.
13 Or whether there is anywheres in the
14 authorization given, the statutory authorization, or even
15 in the congressional history any reservation on behalf
16 of airport proprietors, reservation.
17 MR. FALVEY: Well, I believe there is, your
18 Honor. I will particularize my reasons.
19 Number one. There is no express federal
20 preemption statement in any of the cognate statutes.
21 Unlike many other statutes, like the Clean Air Act, which
22 contains a direct federal preemption, declaration by the
23 Congress. We don't have that here. We have silence on
24 the face of the statute. You do have the pervasive
25

1 regulatory scheme referred to by my colleagues in terms
2 of making available airways and regulating flights,
3 no question about that. The silence of the act is most
4 significant with respect to preemption of local federal
5 regulations.
6 THE COURT: When you use the term pervasive
7 legislation, aren't you saying preemptive legislation?
8 MR. FALVEY: Not necessarily.
9 THE COURT: You can have pervasive control
10 and authority where there is something less than pre-
11 emptive rights?
12 MR. FALVEY: You can have a pervasive scheme
13 that has to do with flights, free right of transit through
14 the air space and navigational equipment that doesn't
15 necessarily --
16 THE COURT: You mean when Congress says you
17 can stay up in the air, but you can't come down.
18 MR. FALVEY: That is correct, your Honor.
19 You can't come down unless the locality wants to take
20 you. That is the whole point. That is very clear in
21 the record.
22 THE COURT: Maybe you have come right to
23 the point. What is the difference between the policeman's
24 hat and the proprietor's hat in the same authority?
25

MR. FALVEY: Your Honor, the only police power the Port Authority has, forgetting about the right of issuing summonses --

THE COURT: They are acting under the express orders of the Governor of New York?

MR. FALVEY: No, sir.

THE COURT: I thought the Governor sent his people into the Port Authority and told them to see to it that the Port Authority put a stop to what Secretary Coleman had ordered.

MR. FALVEY: As our minutes reflect, your Honor, two of Governor Carey's cabinet officers came in and urged that the Port Authority totally --

THE COURT: At whose insistence?

MR. FALVEY: I imagine the Governor's.

THE COURT: It says so right in your minutes.

MR. FALVEY: Yes, it does.

THE COURT: You don't have to imagine it.

MR. FALVEY: What they urged -- I don't know whether they did it on their own initiative or whether they were told to do it.

THE COURT: You mean the Governor sent this memorandum and they acted on their own?

MR. FALVEY: I don't know whether the Governor

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sent them in, your Honor, I just don't know, but they urged a total permanent ban and our board did not adopt a total permanent ban. We adopted a temporary ban.

THE COURT: Did you adopt any regulations?

MR. FALVEY: No, sir.

THE COURT: Does the airport have airport rules and regulations?

MR. FALVEY: Yes, we do.

THE COURT: Do you include in those airport rules and regulations anything about noise control of any aircraft?

MR. FALVEY: Yes, we do.

THE COURT: Cite me to the passage.

MR. FALVEY: The regulation is very simple, it says no jet aircraft shall land at the airport without permission, okay. That is as it says, no jet. Concorde, SST --

THE COURT: You say that is a noise regulation?

MR. FALVEY: Yes, it is. That is the whole purpose of it.

THE COURT: It doesn't use the word noise in it.

MR. FALVEY: No.

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THE COURT: Does it say that no supersonic shall land?

MR.FALVEY: Correct, supersonic is a jet. It is covered by that coefficient.

THE COURT: A supersonic is a jet?

MR. FALVEY: Yes, it is, your Honor.

There are implementing regulations which up to this point --

THE COURT: I don't think, Mr.Falvey, you have any regulations. You have a contradiction of what happened down in Washington, but you don't have a regulation.

MR. FALVEY: I beg to differ with your Honor. We have had a regulation in effect since 1951 which says no jet aircraft shall land at any Port Authority airport without permission of the Port Authority.

There is a very clear procedure for obtaining that permission which has been followed by the British and the French since 1959 when it was first adopted and the test up to this point has been whether or not the aircraft can rate 112 PNdB at given points of airport.

What our resolution says, your Honor, with respect to the Concorde is that Secretary Coleman

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2 permitted a test of the Concorde, only a test, because

3 he was concerned that the Concorde might make unique noises,

4 all right, and also cause excessive vibrations. He

5 was concerned about those things.

6 THE COURT: Why if you were so certain that

7 the Port Authority had the competency to make a resolution

8 that it did make did you provide in the resolution that

9 if necessary your agents should request the Federal

10 Aviation Administration to modify the program at Dulles

11 or at JFK?

12 MR. FALVEY: The answer to that, your Honor,

13 is that --

14 THE COURT: Wasn't this a turning to a

15 higher power?

16 MR. FALVEY: No, I think, your Honor, it

17 was creating the flexibility to do a truly scientific

18 study.

19 The point of that is that the operating

20 procedures --

21 THE COURT: Do you concede that the

22 Secretary of Transportation has the power to order

23 scientific studies?

24 MR. FALVEY: Yes, he does, but that does

25 not mean --

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THE COURT: Has he ordered a scientific study in this case?

MR. FALVEY: Yes, he has.

THE COURT: To determine the technology?

MR. FALVEY: Yes, he has.

THE COURT: And have you said he can't do it at Kennedy?

MR. FALVEY: We have said, your Honor, that he cannot order the Port Authority to accept the particular aircraft at Kennedy Airport.

THE COURT: Aren't his powers of control of development planning and noise control and abatement and the promotion and undertaking of research and development superior to the authority of the Port Authority?

MR. FALVEY: Yes, your Honor, but that's got nothing to do with how they use a particular airport which is the key point here.

THE COURT: In other words, you say that it's within the legal competence of a local authority to tell the Secretary of Transportation that he may not engage in the stimulation of technological advances in transportation at JFK?

MR. FALVEY: Correct, your Honor. If that test involved --

THE COURT: A rather extreme position, Mr. Falvey, to take.

MR. FALVEY: Not if the test involves landings and take-offs, your Honor.

THE COURT: Well, JFK is part of the United States, isn't it?

MR. FALVEY: What we are saying, your Honor, is no different than what Secretary Adams said April 15th, and I will hand this in for the record --

THE COURT: Is there anything in the statute giving the Secretary the power to stimulate technological advances in transportation?

MR. FALVEY: There is nothing in the statute --

THE COURT: Which says they can't do it at a proprietor airport?

MR. FALVEY: It would have to be done the other way around, your Honor.

THE COURT: Is there anything which curbs or limits the power of the federal authorities to stimulate technological advances in transportation at any place in the United States they select?

MR. FALVEY: Yes, there is, your Honor.

THE COURT: What is the language, read it to me.

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MR. FALVEY: I don't have the particular language in front of me. I don't know which section you are referring to, but I would say this --

THE COURT: I am referring to any section that has to do with aviation matters and noise abatement control.

I would like to see a single word which limits the authority of the Secretary in the statutes to non-proprietary airports.

MR. FALVEY: I don't think you would find that, your Honor, but you would be looking for the wrong thing in my opinion. What you would need for the Federal Government to supersede local authority would be an express declaration that it has superseded local authority.

THE COURT: I thought we fought the Civil War and the Federals came out supreme.

MR. FALVEY: Your Honor, all I can do on that point is to quote from January 17, 1977 decision of the Court of Appeals for the Second Circuit.

The Court stated that the prevailing philosophy with respect to federal preemption is as follows:

"We recognize that the exercise of federal supremacy"-- that is what it is all about --"is not likely

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2 to be presumed and there must be a clear manifestation of
3 the congressional purpose to supersede the exercise of
4 power by the State."

5 That is why I say to you I hope not
6 impertinently, your Honor, you would be looking for the
7 wrong thing if you want an express reservation of power
8 to the locality. You need something that overturns that.

9 THE COURT: Is there anything in the
10 congressional debates that says that the Secretary of
11 Transportation may not stimulate technological advances
12 in transportation at JFK?

13 MR. FALVEY: I am not aware of any such
14 thing, your Honor. I don't think that gets to the crux
15 of the matter. I don't think any federal agency can
16 use private or state property even for scientific explora-
17 tions without their consent. They can condemn it if they
18 want to. I will be getting to that a little later on.

19 THE COURT: I am not going to get into that
20 war with you.

21 MR. FALVEY: I hope it is not a war, your
22 Honor.

23 THE COURT: It is clear to me that Congress
24 has the power to preempt operations and other things in
25 the United States. We still are a federal government.

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MR. FALVEY: Your Honor, I don't have the slightest doubt about that.

THE COURT: If they exercise that power and express that exercise in unmistakable, unlimited language --

MR. FALVEY: There is no question about it. There is no issue and there is no case.

THE COURT: What you have to do is to be guided by the language.

MR. FALVEY: Correct.

Your Honor, I might say that that offers perhaps a simple solution. There has been a discussion here about who is passing the buck. A lot of commentary about how important the Concorde's admission is to the foreign relations of the United States.

If it is so important to the United States, there is a very simple remedy and that is the enactment of a bill by the Congress which would clearly preempt local airport operators' powers.

THE COURT: But they tried to enact a bill to clearly ban.

MR. FALVEY: Correct.

THE COURT: Indicating that they must have thought that there was trouble afoot and that they would

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2 like to stop out.

3 MR. FALVEY: Correct, your Honor, but the

4 Administration has not sponsored such a bill and I note

5 that the Federal Government --

6 THE COURT: Indicating again that the

7 Administration considered that we were a Federal Government.

8 MR. FALVEY: Correct.

9 THE COURT: With Federal controls?

10 MR. FALVEY: Right. But we are arguing

11 a law case and I am proposing a solution to the

12 Administration and the airlines, if it is so all-fired

13 important to our foreign relations.

14 THE COURT: Let me take that up with you.

15 Is there any evidence of a congressional intent on the

16 subject of a clash with foreign relations?

17 MR. FALVEY: Yes, there is, your Honor.

18 THE COURT: Is there a word in the congress-

19 ional reports that deals with the bilaterals or the treaties?

20 MR. FALVEY: Yes, there is, your Honor.

21 THE COURT: Read it to me.

22 MR. FALVEY: We have set that forth in our

23 brief.

24 THE COURT: You show me where.

25 MR. FALVEY: In the hearings --

THE COURT: Congressmen said that what we are doing here will override our treaties?

MR. FALVEY: Well, let me do it a couple of ways, your Honor.

At a hearing on one of the bills that Mr. Wells referred to that would have banned the Concorde, there was a detailed exposition of the matter by a counselor for the State Department, and that is set forth in extenso in our brief.

THE COURT: Shouldn't we refer to the hearings and reports on Section 611?

MR. FALVEY: Yes, your Honor. I am coming to that.

The point I am making here has specific reference to the Concorde.

Wherein the State Department acknowledged to the Congress that under the treaties it was still necessary that local airport operators consent be obtained.

I suggest that is one of the reasons those bills didn't pass because Congress was passing the buck to the Port Authority.

MR. NICKLES: Could we have a page reference for that, your Honor?

MR. FALVEY: In the brief?

MR. NICKLES: Where there is a statement by the State Department of Port Authority permission.

MR. FALVEY: We are referring to the statement by Mr. Trimble. It doesn't make specific reference to the Port Authority, but it makes clear that local airport operators have a role in this situation.

THE COURT: Nobody denies that they have a role. Apparently everybody concedes that the Federal Government says you can go out and buy up the land, but what you do with it may become a matter of federal concern.

Go ahead. I don't intend to interrupt your prepared train of thought, but let's get down to the case.

MR. FALVEY: All right, your Honor.

I have been referring to the need for a clear congressional expression of intent to preempt local airport operators' regulations. That is the crux of the case.

I say that the airlines have cited to this Court no statute and no provision of any treaty which could conceivably meet the test of clear manifestation, that is the Second Circuit's language, of a congressional purpose that Secretary Coleman's decision authorizing demonstration flights by the Concorde at Kennedy Airport

supersedes the power of the Port Authority as the airport operator itself to make reasonable regulations with regard to the prevention of excessive noise.

We are not arguing here today whether or not the Concorde makes excessive noise. Rather we are only concerned with whether or not the Port Authority could make such a determination on reasonable and non-discriminatory grounds.

THE COURT: Just let me interrupt once more.

Are you in agreement with Mr. Wells or perhaps with Mr. Nickles that the Court is not asked to decide whether the noise level of the Concorde is tolerable or not acceptable, nor whether the aircraft should be given a chance to prove itself?

MR. FALVEY: Not at this time, your Honor.

THE COURT: Those are matters solely for the governmental agency, isn't that correct?

MR. FALVEY: That is correct.

THE COURT: All right.

MR. FALVEY: The airlines have demonstrated that the Federal Government reigns supreme in providing a free right of transit in the air space to all of the authorized aircraft operators, that the Federal Government reigns supreme in regulating the system of air navigation

facilities and that the Federal Government is committed to the British and French Governments to treat their aircraft on the same basis as domestic aircraft with respect to flight operations in the United States.

What the airlines have failed to do is to demonstrate that any treaty or federal statute requires an airport operator to accept each and every foreign or domestic aircraft for landing and take-off at its airport.

In contrast, I submit that the defendants have carefully documented Congress' unmistakable intent to leave with local government the responsibility to develop, to operate and to regulate our nation's airports.

The very first federal action in the field goes back to 1926 when the Congress enacted the Air Commerce Act. That Act made the Federal Government responsible for establishing the civil airways and the use of federal funds for that purpose was authorized as well as the use of federal funds to maintain all necessary aviation facilities.

However, the Act prohibited the use of federal monies for establishment of airports and expressly excepted airport development from the powers given to the then Secretary of Commerce.

Congress made this determination in reliance

on report and recommendation of the National Advisory Committee for Aeronautics. The Committee had specifically recommended, and the Congress finally agreed, that the Federal Government should leave to municipal authorities the control of airports in much the same manner as docks and harbor facilities for marine shipping.

After World War II, although Congress found that the development of a national airport system was "a matter of national concern", Congress did no more than to authorize capital grants to localities for airport development. It did not disturb the pattern of federal control over the air space and air navigation facilities while leaving to localities the control over the development and operation of the airports themselves.

The conventions and bilateral agreements stressed by the airlines here were entered into subsequent to the enactment of the Air Commerce Act and, therefore, subsequent to the establishment of the congressional policy that local government would control the development and operation of airports.

They, therefore, must be interpreted in light of that background. The State Department advised the Senate Commerce Committee in 1946 that Executive Agreements in the field of Civil Aviation have been entirely consistent

with authorization congressional legislation, namely, the Air Commerce Act.

Your Honor, that was in the time of the Bricker Amendment. If I listened carefully to Mr. Nickles today, what he is arguing is that the bilateral agreements entered into by the Executive Department with the British and French Governments completely changed the congressional policy and congressional framework and I am sure if Senator Bricker were with us, he would be astonished to hear that, and it was in connection with the Bricker Amendment considerations that the State Department advised the Senate Commerce Committee in 1946 that the Executive Agreements have been entirely consistent with authorizing congressional legislation.

THE COURT: Let me ask you on that point: Is the Port Authority competent to override an actually existing obligation of the United States under the bilateral agreements?

MR. FALVEY: No, sir, if there were any such obligations, we would have to honor them, but I find none.

THE COURT: Is a noise standard of the Port Authority a law or a regulation within the meaning of Article 5 of the bilateral agreements?

MR. FALVEY: I believe it is a law of the United States. It is within the framework of the laws of the United States, your Honor, because I have just finished describing how --

THE COURT: The Port Authority's ban is a law?

MR. FALVEY: No, the law -- that is the law in this case -- is that Congress has recognized that the development and operation of airports is a matter of local concern and local regulation. That is the law that is involved here and that is how Article 5 must be interpreted.

I am not talking about what the Port Authority decides or not decides, I am talking about what the Congress decided before these treaties were entered into.

THE COURT: That means that you agree that a noise standard of the Port Authority is not what is referred to in Article 5 of the bilateral agreements.

MR. FALVEY: But it is authorized.

THE COURT: That is a different subject. We can get on to the question of whether there was or wasn't authority elsewhere, but the Port Authority's ban is neither a law nor a regulation for purposes of Article 5, isn't that so?

MR. FALVEY: I say that it is sanctioned

by Article 5.

THE COURT: That is a question of interpretation, a two-step interpretation?

MR. FALVEY. Correct, your Honor.

I say further it is not inconsistent with Article 5.

My point, your Honor --

THE COURT: By the way, while we are still back on that point, did I understand you to say that the Port Authority's regulations in connection with jet aircraft means that an unscheduled SST cannot land at JFK?

MR. FALVEY: That is correct, your Honor.

THE COURT: Federal law says that unscheduled flights can land anywheres in the United States if they are certificated airlines.

MR. FALVEY: I don't believe that is the federal law, your Honor.

THE COURT: All right, you had better look that up.

MR. FALVEY: Your Honor, again repeating, Article 11 of the Chicago Convention requires that all aircraft engaged in international aviation must comply with the laws and regulations of the contracting state. That

must be deemed a required compliance with congressionally sanctioned airport operators noise regulations.

We have had references this morning to Griggs v. Allegheny. My point in referring to it is that the Supreme Court there underscored the role of the airport operator.

Justice Douglas described the airport operator as the "promoter, owner and leasor who decided, subject to the approval of the CAA, where the airport would be built, what runways it would need, their direction and their length, and what land and navigation easements would be needed."

The Federal Government takes nothing, said Justice Douglas, it is the local authority which decides to build an airport and where it is to be located.

What the Court then proceeded to hold is really what has prompted the Congress persistently to freeze the respective responsibilities of the airport operator and the Federal Government in noise context.

The Court in Griggs decided that the airport operator is financially responsible for whatever takings of property might result from the noise of low-flying aircraft during take-off and landing operations.

The record is clear that when Congress first entered the aircraft abatement field in 1968 it was specifically concerned that total federal preemption of aircraft noise regulation would lead to a reversal of the Griggs decision and the consequent imposition of legal and financial liability for noise takings upon the Federal Government.

Accordingly, there is and there was no express federal preemption provision in the act with respect to airport operators regulation of noise.

The underlying Senate Committee report, while noting that state and local government would remain unable to exercise their police powers to control aircraft noise through the regulation of flights, expressly stated and now I am quoting:

"The proposed legislation will not affect the rights of the state or local public agency as the proprietor of an airport from issuing regulations or establishing requirements as to permissible level of noise which can be created by aircraft using the airport.

"Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise consideration so long as such exclusion is non-discriminatory."

I should stress that to achieve the result sought by the airlines here, namely, that the Federal Government can mandate local airports to accept all foreign and federally certificated aircraft, more than a preemption provision would be necessary as a practical matter.

What would be required would be a complete federal takeover of airport development and operation and that follows from the fact that an airport operator, even if its regulatory powers had been preempted, could not be federally mandated to extend the runways or build the other facilities which might be necessary to accommodate future generations of aircraft.

As a proprietor, it would remain free to decide whether or not additional service or improved service might not be outbalanced by required construction or land costs for damages taken.

Your Honor, that same concept is in the Congressional Record with respect to the enactment of the Federal Noise Abatement Act. I am referring to a letter to the Congressional Committee filed by the then Secretary of Transportation Alan Boyd, who incidently is handling the negotiations now on the bilaterals for the United States, Secretary Boyd advised the Congress at that

time:

"The Federal Government is in no position to require an airport to accept service by larger aircraft and for that purpose to obtain longer runways. Likewise the Federal Government is in no position to require an airport to accept service by noisier aircraft and for that purpose to obtain additional noise easements.

"The issue is the service desired by the airport and the steps it is willing to take to obtain the service.

"In dealing with this issue the Federal Government should not substitute its judgment for that of the states or elements of local government.

"The proposed legislation" now is he talking about your 611, your Honor -- "is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations."

Your Honor, for your convenience that is set forth in the opinion in Burbank v. Lockheed Air Terminal, 411 U.S. 624, 36 Law et. sec. and 546 and 47 at page 563.

THE COURT: Thank you.

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Now, the judicial decisions interpreting the 1968 noise abatement legislation fully support the position we espouse and as recommended by Secretary Boyd in the passage I just read. We agree with our colleagues representing the airlines that the Burbank versus Lockheed decision in the Supreme Court holds that state police power regulation of flights is preempted by federal statutes and regulations.

However, just as --

THE COURT: Even as to SST's?

MR. FALVEY: Pardon?

THE COURT: Even as to SST's?

MR. FALVEY: Correct. However, Justice Douglas expressly stated, admittedly in a footnote, that in deciding Burbank, the Court did not consider, and I am quoting, "did not consider here what limits if any apply to a municipality as a proprietor."

In National Aviation versus --

THE COURT: Let me ask you, then, what is the rational difference between the police power being exercised by a local government and the proprietor power? After all, the Port Authority is an agency of the State of New York and of New Jersey.

MR. FALVEY: Correct, your Honor.

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THE COURT: And in effect it is acting as an arm of the state. Now you are telling me that there is no conceivable reason why, if the State of New York was exercising its police power, or the Town of Hempstead was exercising its police power, that that couldn't be struck down under the legislation; but the minute you call yourself the owner of a piece of property, the same local government assumes a new case. What is the difference in power?

MR. FALVEY: The difference, your Honor, is the attempts to apply police power have all related to flight of aircraft or, in the case of Burbank, a curfew, which is a prohibition against flight, which have been imposed as a straight exercise of the police power.

THE COURT: Well, wasn't there --

MR. FALVEY: And the flight of aircraft, your Honor, is preempted by the federal regulatory scheme.

There is nothing in the federal regulatory scheme that permits a Federal Government to mandate a particular airport operator to accept a particular aircraft.

He is obliged to treat aircraft without discrimination based on nationality, which is involved in this case. He is required, if he is taking federal aid, to accept all comers without discrimination or bias.

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THE COURT: That doesn't tell me why --

MR. FALVEY: The key distinction, your Honor, is --

THE COURT: That doesn't tell me why there should be a difference in respect to regulating noise between the exercise of local police power and the exercise of local proprietary interests. That is just describing a difference in result, but what is the reason? What rational basis is there for saying that there is a difference in respect of regulating noise between the exercise of local power and the exercise of local proprietary interest?

MR. FALVEY: Your Honor, my response has to be that Congress permitted the airport operator to regulate noise in recognition of the fact that under Griggs the airport operator is liable and not the Federal Government, and the thesis is that if the airport operator has the liability --

THE COURT: Where does Congress permit the local people to regulate noise? Is there anything in what Congress did, apart from what Congress said, that vested authority in local agencies to regulate noise?

MR. FALVEY: Your Honor, Congress did nothing to preempt. In my opinion Congress did nothing to preempt because Congress was told by the responsible

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2 federal agencies that the legislation will not affect the
3 rights of a state or local public agency, as the proprietors
4 of an airport, from issuing regulations or establishing
5 requirements as to the permissible level of noise that
6 can be created by aircraft using the airport.
7 Airport owners acting as proprietors can pre-
8 sently -- talking about 1968 -- deny the use of their
9 airports to aircraft on the basis of the noise consideration,
10 so long as such exclusion is nondiscriminatory.
11 And the theory, your Honor, is very simple --
12 THE COURT: Are you familiar with that line of
13 cases that speaks of determining whether the supremacy
14 clause is to be invoked on a two-pronged test; one,
15 to determine Congressional intent, and two, to determine
16 whether there is an irreconcilable conflict between
17 what the federal agency and the local agency do?
18 MR. FALVEY: Your Honor, in my opinion you get
19 to conflict only if there has already been preemption,
20 and the preemption has to be clearly manifested under
21 the holding of the Second Circuit, which I have quoted
22 from earlier. That is Exxon against the State of New York.
23 In that case, your Honor --
24 THE COURT: Preemption is a doctrine that
25 relates to the question of the intent, going to the question

of intent. But when you have an authorized agency authorized to deal with noise abatement and authorized to deal with every facet of aviation, including technological advances and testing of new aircraft in domestic and foreign interest, and you find that an agency has acted in a way which is absolutely contradicted by a local agency, don't you get into a question of supremacy?

MR. FALVEY: No, you don't, your Honor, because the supremacy first has to be invoked by the Congress. And it wasn't invoked in this case, because whatever powers --

THE COURT: That is not what the Avocado case said. The Avocado case, if you are familiar with it, said that there is a two-pronged test. One is, you look for the intent of Congress.

MR. FALVEY: That is what I am urging.

THE COURT: And if you find that there was an intent of Congress in a direction, that doesn't answer all of it. You then go to the question as to whether there is a conflict. And if there is a conflict in the exercise of the respective powers, federal and local, the local has to give way. That is what they held. The Supreme Court said so, didn't they?

MR. FALVEY: Yes, your Honor. And I am forced

to agree with them.

THE COURT: Isn't that the ballgame?

MR. FALVEY: No, it is not, your Honor, because there first has to be a Congressional intent to oust the local powers. That is what I am saying. I don't find that here.

THE COURT: That makes it a one-pronged test, not a two-pronged test.

MR. FALVEY: No, because if you meet the first test, then you get to the second question. But you have to make the first one first, the first test first.

Now, your Honor, there is a decision directly in point, and that is National Aviation versus City of Haywood, in the United States District Court for the Northern District of California, and it is set forth in full in our appendix, sustaining an airport operator's night curfew on jet aircraft, holding that Congress and the FAA "do not appear to have preempted the area."

The Court reached this conclusion after stating that to hold otherwise, "we impose upon airport proprietors the responsibility under Griggs for obtaining the requisite noise easements; yet deny them the authority to control the level of noise produced at their airports."

The Court concluded: "This is, of course,

exactly what the Senate Commerce Committee indicated that the 1972 amendment to Section 611 of the Federal Aviation Act was not intended to do."

I would like to repeat that. The Court said to hold otherwise than to sustain the airport operator's regulations would have imposed on airport operators the Griggs' responsibility for liability. And the Court goes on to say that this is exactly what the Senate Commerce Committee indicated that 611 was not intended to do. Congress did not intend to deny to the local authority that has the liability the ability to control the level of noise.

The airlines here basically ask this Court to place the Port Authority on the horns of the same dilemma that the Judge in the Haywood decision rejected. They say, the airlines, that the Port Authority's powers to act to protect itself and the public, should this Court so find that the Concorde -- if the Port Authority might find that the Concorde would produce excessive noise levels.

The airlines say that even with that finding, which hasn't been made yet, the Port Authority would be powerless to act.

The Federal Government makes no such claim,

1 your Honor. Secretary Coleman didn't assert it. In fact
2 he acknowledged that federal policy remains that it claims
3 no preemption of airport operators' powers.
4 The State Department made no such claims, and
5 the President has made no such claim.
6 Your Honor, just April 15th -- and I will
7 submit this to the record -- Secretary Adams was asked a
8 question at a press conference, and I have the transcript
9 here. The question was, "Is there no way that the Federal
10 Government can open up Kennedy to Concorde flights?
11 Is there nothing at all you can do?"
12 Secretary Adams: "Not without changing the
13 whole basic policy of approach that has occurred in the
14 United States to this point, which is that we go with cer-
15 tification of aircraft and with noise rules, and the
16 individual airports determine the so-called footprint
17 or operating noise specifications of the individual fields.
18 So we have been observing, with our French and British
19 friends, precisely the rules we apply here."
20 THE COURT: There is no need to come into the
21 court, then, if this man speaks as the oracle, isn't that so?
22 MR. FALVEY: Your Honor, I didn't bring this
23 to court; the airlines did. And they are claiming a
24 federal preemption, and I am pointing out that Secretary
25

1 Adams doesn't agree that there is a federal preemption.
2 And were the airlines correct, I suggest that the Federal
3 Government would be here in support of the airline
4 motion.
5 THE COURT: I suppose if you were right, they
6 would be here holding your arm up.
7 MR. FALVEY: I beg your pardon, your Honor?
8 THE COURT: I say they would hold you up
9 as the winner if they thought that you were right. Isn't
10 that so?
11 MR. FALVEY: Well, I am afraid, your Honor,
12 that if they appeared here on the airlines side,
13 they would have to worry about some possible liability.
14 And I think that is why they are not here.
15 THE COURT: That may indicate that they are
16 being ambivalent so far as the Port Authority is concerned,
17 but does it indicate that the administrator and the Secretary
18 of Transportation do not have the overriding power?
19 MR. FALVEY: Well, as I read it, he doesn't
20 claim it, and he hasn't exercised it if he does claim it,
21 and neither did Secretary Coleman.
22 THE COURT: Do you think that the order of
23 the Federal Aviation Administration was ultra vires?
24 MR. FALVEY: Oh, no, sir.
25

I think there were certain federal steps that had to be taken, particularly in compliance with NEPA.

THE COURT: Do you think the Secretary of Transportation's order was ultra vires?

MR. FALVEY: No, sir, I think he had a perfect right to direct the FAA to take Concorde into Dulles because he controls Dulles but he does not control Kennedy Airport.

THE COURT: Does the resolution of the Port Authority to study noise of supersonics conflict with Secretary Coleman's order?

MR. FALVEY: No, your Honor, I don't believe it does. Secretary Coleman acknowledged in his order that it had been federal policy to recognize the right of airport operators to promulgate noise regulation.

THE COURT: Does the Port Authority accept the statement of the Secretary of Transportation that a test demonstration of the Concorde operations is in the interests, overall interests, of the national enclave?

MR. FALVEY: Your Honor, we earnestly considered Secretary Coleman's opinion that it was desirable to have this test, but we did not feel that --

THE COURT: And do you also accept the notion?

MR. FALVEY: -- that we were mandated to follow

it.

THE COURT: Do you also accept his notion that the test that he has suggested or ordered, whichever way you take it, represents a significant potential benefit to international commerce?

MR. FALVEY: Your Honor, I have no view on that.

THE COURT: Well, did the Secretary of Transportation find that the public benefits flowing from the entry of the aircraft at JFK outweigh its environmental costs in the form of noise and others?

MR. FALVEY: Your Honor, I have no view on that and I don't think it is pertinent.

THE COURT: You don't have to have a view. All you have to do is read his opinion. Doesn't he say that?

MR. FALVEY: Yes, he does say that but I don't think that that is dispositive of the question before us today.

THE COURT: Well, did the Port Authority, as a final sally, condemn the Concorde without a hearing or a trial?

MR. FALVEY: No, your Honor, we did not. We were mindful of Secretary Coleman's concern --

THE COURT: You wanted a second trial.

MR. FALVEY: Your Honor, we wanted to examine it ourselves under our own prerogatives as sanctioned by the Congress. That is absolutely correct, and we are still doing so.

THE COURT: The issue is very clearly drawn.

MR. FALVEY: I would say, your Honor.

I would like to close --

THE COURT: I have one other question for you before you close, because you may want to wrap up this. It has been said in the federal courts that the FAA is authorized under the provisions of Section 1353(b) of Title 49 to conduct tests which tend to the creation of improved aircraft, and that the SST clearly falls within the category of such improved aircraft.

Do you agree with that Judge or disagree with him?

MR. FALVEY: Your Honor, I am not familiar with that.

THE COURT: I don't believe you cited it. I don't believe that the airlines cited it. But for both of your benefits, you will find it in Coxsie against Halaby, 231 F. Supp. 978, written in 1964, and the precise quote is that, "The FAA is authorized under 49

USC Section 1353(b) to conduct tests which tend to the creation of improved aircraft. The SST clearly falls within the category of such 'improved aircraft'."

That is at page 979. And for your convenient reference, Section 1353(b) reads that "The Administrator is empowered to undertake or supervise such developmental work and Service testing as tends to the creation of improved aircraft."...

MR. FALVEY: Your Honor, I can make a partial response at this point. I don't believe that that concept or that statement would, for example, authorize the Federal Aviation Agency to direct the Port Authority to accept the Concorde at Newark Airport and spend $15 million to extend a runway which would be necessary for that purpose.

THE COURT: One further thing. The Congress has declared it to be the law of the land that Congress hereby declares that the general welfare, the economic growth and stability of the nation, and its security, require the development of national transportation policies and programs conducive to the provision of fast, safe, efficient and convenient transportation at the lowest cost consistent therewith and with other national objectives, including the efficient utilization and conservation of the nation's

resources." And among those they say specifically, "For the purpose of stimulating technological advances in transportation." 49 U.S.C. § 1651.

Now, there is no question but what when the jets came in, the first class of jets, when they were superseded by the second class and third and fourth and fifth class, they came in in improved technological status. Isn't that right?

MR. FALVEY: Your Honor, I think we can claim some credit for that, because when they first applied for permission for the Comet, we denied it and it was retrofitted.

THE COURT: Why do you want to stultify this time the idea of starting out somewheres and working toward improvement with SST's?

MR. FALVEY: Your Honor, our study is still under way. It could be that we will cooperate with the Federal Government.

THE COURT: You can study it until the point of extinction. The idea is to come to a conclusion. If you haven't been able to come to a conclusion in a year, after somebody else federally has come to a conclusion on the basis of hearings, evidence, people who are opposed, vigorous people who are opposed, vociferous people

who are opposed.

MR. FALVEY: Your Honor, I mentioned earlier that it was in early April that the airlines submitted revised procedures.

THE COURT: That is a year after the event.

MR. FALVEY: That is correct. But it makes us stop what we were doing and not start completely over but certainly delay. How long will delay,your Honor I frankly don't know.

THE COURT: I frankly am unimpressed with the celerity of the study.

MR. FALVEY: It is a very difficult study, your Honor.

THE COURT: Then why don't you leave it to somebody who knows and who did it?

MR. FALVEY: Your Honor, that might be possible. Mr. Wells, this morning, opined that we should have no concern about liability whatsoever, and I would ask him if perhaps his client might give us an indemnity if he is all that certain.

THE COURT: Would you allow the SST or the Concorde in with that indemnity?

MR. FALVEY: That would be half the problem. The other half is our concern for the community.

THE COURT: Now you are abrogating your request. I almost thought we had a deal here.

(Laughter.)

MR. FALVEY: I will take the partial deal, your Honor.

THE COURT: Well, I think perhaps, Mr. Falvey, before you conclude your peroration, you might give some thought to the following sections of the law, in addition to what has been cited as the basis of the pervasive power enjoyed by the Secretary of Transportation, subject to such policies as he may delegate to the local authorities, and also subject to such overriding considerations as he may think are pertinent in connection with tryouts of something new.

I suggest you take a look at 49 USC Sections 1353, 1431, 1651, and 1653, and then read the Hallaby case and see whether that doesn't help the Port Authority to believe that maybe they are still part of the United States.

MR. FALVEY: Your Honor, I will be delighted to do so. And may I have leave to submit a letter in a day or two if I think that is necessary?

THE COURT: Oh, yes. You have taken plenty of time. I expect to take at least two days.

MR. FALVEY: Your Honor, my final point is that the airlines' interpretation of the conventions and agreements that are involved here would result, on the one hand, in the preemption of the United States airport operators' powers as to foreign aircraft -- that is their first point; under the treaty they have gotten their documents from the Federal Government, that is the end of of it -- preemption of airport operators' powers as to foreign airport; but, on the other hand, the preservation of foreign airports' noise regulation as to our carriers' aircraft.

That may seem strange, but it follows from the fact that the British and French Governments control the overseas airports, and their airport regulations would clearly be within the laws and regulations of the contracting states -- the provision we discussed earlier. Under the airlines' reasoning here, foreign-operated aircraft would have a position vis-a-vis local airport operator regulations in this country superior to that of aircraft operated by our own domestic carriers.

In other words, if Pan Am were to order a Concorde and use it domestically, which is a wild example, I will admit, Pan Am would have to get our permission. They claim they would not. That is,our domestic carriers

1 derive no comfort from the treaties and agreements and
2 would remain subject to airport operators' regulations.
3 Furthermore, United States overseas
4 carriers would be subject to airport noise regulations
5 at the British and French airports as well as at the United
6 States airports. But the British and French airlines
7 would not be subject to United States airport operators
8 noise regulations at all.
9 I submit that the conventions and agreements
10 provide for equal treatment of foreign-operated aircraft
11 but not the preferential position urged by the airlines
12 here.
13 I submit finally that the incongruous results
14 urged by the airlines can be sustained by this Court only
15 if there is clear manifestation of congressional purpose
16 to cause them. I am satisfied that we have demonstrated
17 that Congress did not intend to authorize any preferred
18 position.
19 THE COURT: Are you also satisfied that there
20 is an irreconcilable conflict between the orders as
21 expressed by Secretary Coleman and the resolution as
22 expressed by the Port Authority?
23 MR. FALVEY: No, your Honor, I do not.
24 THE COURT: The one saying, "Let them in for
25

a try," and the other one saying, "Nothing doing."

MR. FALVEY: I don't see an irreconcilable conflict. Had he issued an order to us --

THE COURT: What is the room between saying "Come" and "Go" and "Don't come"?

MR. FALVEY: The difference, your Honor, is what is illustrated by what he said about Dulles. He ordered the FAA to accept it at Dulles. You will find no order to the Port Authority in that decision to accept it at Kennedy. Thank you very much.

THE COURT: Thank you. Is there anybody else who wants to be heard for five minutes?

MR. KALMUS: Yes, your Honor. We know that you have had a long session, but there are some things that we would like to add.

MR. DENSON: There is somebody else who also would like to be heard.

THE COURT: We will give you each five minutes to give us a footnote here.

MR. KALMUS: Your Honor, my name is Jeffrey Kalmus, and I am here on behalf of a group of entities, Friends of the Earth, a coalition to stop the SST, and various other groups and unity groups in the neighborhood of JFK.

1 I would like to address myself to the matters
2 that seem most to concern you, and I think the proper
3 place to pick up is where your last question left off,
4 and that, as I understood it, was whether there was an
5 irreconcilable conflict between Secretary Coleman's
6 decisions and the Port Authority's action. And I think
7 that Mr. Falvey was correct when he said there was not.
8 If one reviews the Secretary's decision,
9 what you find right up front, on the third page of it,
10 is an express recognition that while the Secretary has
11 the power to decide finally and on behalf of all that
12 the Concorde shall come into Dulles Airport because the
13 Federal Government owns it, he makes very clear and says
14 that the situation with respect to JFK may be different.
15 And he then goes on to explain why it may be different.
16 THE COURT: Different as a matter of policy,
17 is that right?
18 MR.KALMUS: Different as a matter of power,
19 your Honor.
20 THE COURT: He does not say that, does he?
21 MR. KALMUS: No, I think he does say it.
22 He says --
23 THE COURT: Wait a minute. You said it two
24 ways. You said, "No, he does."
25

1 MR. KALMUS: I am sorry, your Honor. I should
2 make myself clear. I think that the Secretary of
3 Transportation did make clear that he recognized that the
4 proprietors of JFK, Port Authority, had a separate and
5 independent decision to make as a matter of power.
6 THE COURT: Did he use the word "power"
7 anywheres?
8 MR. KALMUS: No, he did not use the word
9 "power."
10 THE COURT: Does he use the word "policy,"
11 "Departmental policy"?
12 MR. KALMUS: He said that federal policy was
13 to leave to the local operator a certain area of decision,
14 and with respect to JFK, he meant to leave to the Port
15 Authority a separate decision-making power. He was
16 saying, I have exercised federal power in full. I have
17 done all that I can as a federal Secretary of Transporta-
18 tion. And now that disposes of the issue for Dulles,
19 because we, the Federal Government, own Dulles. But we
20 don't own JFK. Our policy as a Federal Government, our
21 executive policy, our policy as we read Congress's intent,
22 was to leave to local airport proprietors a separate
23 decision-making power.
24 THE COURT: So you would say that if he
25

1 wc 6

2 exercised in fact the right to permit a tryout of the
3 Concorde at JFK, that his action is ultra vires?
4 MR. KALMUS: I would say that he does not have
5 the right by himself and without the concurrence of the
6 Port Authority to authorize a trial at JFK.
7 THE COURT: And therefore do you also contend
8 that his act by himself, if he did it by himself, would
9 be ultra vires?
10 MR. KALMUS: I don't think that he purported
11 to do it by himself. I believe he purported to recognize --
12 THE COURT: That is the second time that you
13 told me what you don't believe. But I would like to ask
14 you whether you do believe that if he in fact permitted
15 and directed the Concorde to land for scheduled commercial
16 flights under the limited circumstances and for the limited
17 time that he expressed, that he was doing that ultra vires
18 his powers?
19 MR. KALMUS: Yes. Again I say I don't believe
20 he did that.
21 THE COURT: You and Mr. Falvey disagree,
22 apparently.
23 MR. KALMUS: I don't think so, your Honor.
24 The Secretary, I might add, subsequent to his decision a
25 week later, had a gathering with the press and others, and

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1 he reemphasized what he thought. He said that his
2 statement, referring back to the footnote on page 3 of
3 his decision, the statement was made in recognition of
4 the fact that under federal policy that has hitherto
5 prevailed, local airport proprietor, and that is like
6 the Port Authority, has had the authority under certain
7 circumstances to refuse landing rights -- then the key
8 sentence --"For the present this remains the policy of
9 the Department."
10 Then if you carry through since February 1976,
11 down through 1976, into this year, down to ten days ago,
12 April 15, when the new Secretary, Mr. Adams, had a press
13 conference, you find time and again a recognition over
14 and over by the Executive Department that the decision is
15 up to the Port Authority.
16 THE COURT: Was there ever a prior instance
17 of an attempt by the Federal Government to try out a new
18 technological development that was frustrated by a local
19 authority -- frustrated in the sense that the local
20 authority had to give its consent?
21 MR. KALMUS: I assume that you are speaking
22 with respect to airports and airplines.
23 THE COURT: Of course.
24 MR. KALMUS: My answer is that I don't know,
25

1 your Honor. I don't know that the issue has ever been
2 posed in this fashion before.
3 THE COURT: Therefore, if you refer to a
4 policy of the Department, the federal policy, you are
5 talking about something that is not factually the
6 equivalent of the present situation.
7 MR. KALMUS: I agree that this situation is
8 not precisely identical to prior ones.
9 THE COURT: And that may be the explanation
10 for the soliloquy in footnote 6.
11 MR. KALMUS: You don't have to rely merely
12 on that soliloquy, your Honor. As I said, you have the
13 Secretary's own statement a week or ten days later, where
14 he indicated that that policy was still the federal policy.
15 Then you come down to November of 1976, and
16 at that time you know the noise abatement policy materials
17 appeared, and they were authored by the Department of
18 Transportation and by its Federal Aviation Administration.
19 And if you look at that rather learned document -- and I
20 think it is: it discusses the law, it discusses the
21 policy, it discusses the past, the future -- what you see,
22 I count seven instances where the Department acknolwedges
23 that the power in local proprietors of airports are to
24 control aircraft using its airports.
25

1 Just by way of example, your Honor, I read
2 from page 34.
3 THE COURT: Please don't read, because I think
4 I am thoroughly familiar with the record before me, and
5 what I want to know is, if you have anything to add to
6 what has been so persuasively and completely exposed on
7 both sides of the aisle.
8 MR. KALMUS: Let me comment on just one brief
9 point where Mr. Falvey and I, I think, disagree, and it
10 relates to a question that you asked, so I assume it is
11 a matter of some concern to you, and that concerns this
12 Article 5 business.
13 You will recall that you asked --
14 THE COURT: I remember. Go ahead with your
15 point.
16 MR. KALMUS: -- about laws and regulations of
17 the contracting parties and what that meant.
18 Our position, and we discuss it at length
19 in our brief, is that regulations of a contracting party
20 most assuredly includes regulations such as those of
21 a local government or in this instance the Port Authority.
22 THE COURT: The Port Authority has no
23 regulation. All that they did was to have a resolution
24 say, "Stop. Don't let him in." The only thing that
25

1 Mr. Falvey claims to be a regulation is that jets have
2 to get permission, which is a far cry from what we are
3 talking about.
4 MR. KALMUS: Well, I think he referred also,
5 and I certainly think it relevant to refer to the
6 specific noise policies at JFK, specific limitations.
7 And if those are not regulations, I don't know what they
8 are.
9 THE COURT: If your point is that the resolution
10 is a regulation within Article 5, I get your point.
11 Anything else? I don't mean to cut you off, but really
12 this is just supererogation that we have heard now for
13 about three hours.
14 MR. KALMUS: Let me just say, your Honor --
15 THE COURT: And I have read your very careful
16 brief, I will say that to you. I thought it was a very
17 excellent piece of legal craftsmanship, some of which I
18 don't agree with.
19 MR. KALMUS: That is an unfortunate failing
20 I have often with judges disagreeing with me. Thank you,
21 your Honor.
22 THE COURT: I am glad to know that you are
23 not infallible.
24 MR. KALMUS: Thank you, Judge.
25

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MR. DENSON: May it please the Court --

THE COURT: Will you state your name for the record.

MR. DENSON: My name is William D. Denson. I appear here, may it please the Court, in behalf of the Town of Hempstead, Incorporated Villages of Lawrence, Cedarhurst, and Atlantic Beach, and some other individuals. And we appreciate the opportunity to express ourselves at this time.

THE COURT: I want to compliment you also on the excellence with which you stated your point of view, some of which I don't agree with.

MR. DENSON: Well, I am sure of that, your Honor, otherwise I would not be here. If I thought you agreed with me, I would not take your time.

THE COURT: It was very well articulated.

MR. DENSON: Thank you, sir.

In that connection, your Honor, Mr. Kalmus has stolen a little bit of my thunder, but basically there have been some illusions here to what was decided back in 1965, and I am not so sure -- I mean by the arbitrament of the sword, your Honor.

THE COURT: You think that the Mason and Dixon line moved up to Howard Beach?

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2 MR. DENSON: We are working on it, Judge.
3 That is exactly what we are trying to do, and we are
4 trying to bring to your Honor's attention that there are
5 some things that still remain as limitations upon the
6 Federal Government. That big old Uncle Sam, he can draft
7 an amendment to the operations specifications, if your
8 Honor pleases, and I think really the crux of this case is
9 what your Honor asked the question in the beginning. What
10 was it that Secretary Coleman decided? Did he mandate
11 the use of JFK by the Concorde? Because when you answer
12 that question, if it please the Court, all the rest of
13 these constitutional issues fall into place.
14 THE COURT: You think he was going through
15 an empty exercise?
16 MR. DENSON: Oh, let me tell you, he was doing
17 less than that, your Honor. What happened at that time --
18 THE COURT: That means the whole thing is just
19 a vacuum.
20 MR. DENSON: Well, that is your language, your
21 Honor. I think it is a little different than that. What
22 Secretary Coleman did was to decide that the Concorde
23 could come in here as a type of aircraft which would comply
24 with the requirements of NEPA, the Environmental Policy
25 Act.

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THE COURT: He did not say the Concorde could come in here. He said we will try it out for a little bit here and see whether all of these opponents from --

MR. DENSON: He said you got to get it in here to try it out. And what he did, he did nothing more --

THE COURT: You object to an evidentiary hearing, do you, in a case?

MR. DENSON: Sir, you know my position. I have been arguing this thing for a long time. I think that there should be an evidentiary hearing based upon a factual demonstration.

THE COURT: You are objecting to a factual demonstration because you are afraid of the consequences or because you are sure of the consequences?

MR. DENSON: Oh, on the contrary, your Honor, there is enough experience everywhere to sustain the position that we take in this matter.

THE COURT: Everybody else is claiming that JFK is sui generis, it is unique, and you can't tell what to do about JFK, merely because you know Dulles and you know DeGaulle and you know Heathrow, Now you are telling me, "But we are not going to give anybody a chance to find out as far as JFK is concerned."

MR. DENSON: No, sir, what I am trying to tell you is this --

1 wc 14

2 THE COURT: There is no other airport that

3 comes over the water like JFK, of these three others?

4 MR. DENSON: Oh, yes, you have Logan in

5 Boston.

6 THE COURT: We are not talking about Boston.

7 MR. DENSON: We are talking about airpots

8 other than New York.

9 THE COURT: What I am saying to you is that

10 JFK comes in over the water, Heathrow does not, nor does

11 Dulles, nor does DeGaulle. Isn't that so?

12 MR. DENSON: That is correct, sir.

13 THE COURT: Therefore, JFK has its special

14 circumstances.

15 MR. DENSON: Absolutely. It still has a

16 special circumstance.

17 THE COURT: Shouldn't you have a factual trial

18 to find out whether it is good or bad?

19 MR. DENSON: That would not necessarily be a

20 deciding criterion, your Honor.

21 THE COURT: That is a different subject.

22 Secretary Coleman said, "I am not telling you now how I

23 forecast my ultimate determination of a license to these

24 airplanes, but I am going to find out what it is all about,

25 and I am going to find out on the basis of takeoffs that

take less than four minutes a day among thousand operations. The thing that you get into the trouble with is on the takeoff, and on the takeoff he has found that it is under one minute for each takeoff, and four planes are going to take off from JFK between the hours of 7 in the morning and 10 o'clock at night, which is eight operations, four out and four in, and there are a thousand operations going on there at JFK. And you are telling me that you don't want to find out whether the clatter that is added by the Concorde really is unacceptable noise. Isn't that what it is?

(continued on next page)

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2 MR. DENSON: Your Honor, you have done a
3 magnificent job of turning this whole matter upside down.
4 You started out here with the naked issue -- the naked
5 issue of whether or not the Port Authority had the power
6 to issue that ban. Now your Honor has switched this
7 thing back around to this evidentiary hearing, which I
8 wanted to have a long time ago, but --
9 THE COURT: Did you go down to Washington for
10 the hearing?
11 MR. DENSON: No, sir.
12 THE COURT: Did you go to the hearings in New
13 York?
14 MR. DENSON: Yes, sir, I did. I sure did.
15 THE COURT: You were heard?
16 MR. DENSON: I was heard for a very short time--
17 THE COURT: They gave you respectful attention --
18 MR. DENSON: Oh, wait a minute. They only
19 gave me 30 seconds down in Washington so I didn't go.
20 I could hardly tell them my name in that period of time.
21 THE COURT: Mr. Denson, it seems to me the
22 question resolves itself into this: It is not up to me to
23 say whether the Concorde is noisy or not noisy.
24 MR. DENSON: Right.
25 THE COURT: If that has been decided upon by

1 competent authority, and the competent authority has
2 the pervasive power to indulge in technological tests of
3 supersonic aircraft, a new development in commercial
4 aircraft, then it is going to be very difficult for anybody
5 to dissuade me that there was anything ultra vires in the
6 acts of the Secretary of Transportation.
7 MR. DENSON: Wait a second, your Honor.
8 THE COURT: I am going to let you talk. I am
9 going to give you an expanded five minutes.
10 MR. DENSON: Thank you.
11 THE COURT: If there is that power and if
12 there is a statutory power again for test operations,
13 as there must be, it doesn't appeal to anybody's intelligence
14 to say that you can't try something out and if the tryout
15 is under adequately limited circumstances for an adequately
16 limited time, and nobody is complaining here about the
17 circumstances or the time, all the Port Authority is saying
18 is, I want to take a look for myself.
19 They are not saying that there is anything
20 vicious or improper about these four minute takeoffs during
21 all of these hours, 16 hours or 15 hours a day. If that
22 is so, then it seems to me that, as we have done in
23 all cases coming into the federal court, we are prone
24 to say, give them a chance to prove or disprove what
25

1 eorf 3

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2 is going on, and if that chance to prove or disprove
3 what is going on is not so bad that it is on its face
4 something that is thoroughly unacceptable, I hesitate
5 to believe that the Town of Hempstead or the Port
6 Authority can contradict the Federal Government in its
7 appreciation of what is good for the national good.
8 MR. DENSON: Your Honor, that is beautifully
9 put. The only problem I have with it is this:
10 Number one. Will your Honor use 450,000
11 people out there as guinea pigs, that is number one.
12 This is what you are subjecting us to when you
13 say you have only one minute out of the thousands of flights
14 that take off there per day.
15 But, your Honor, that atomic bomb goes off
16 in one minute -- it goes off in one minute.
17 What your Honor is saying is a cumulative effect
18 of that atomic bomb along with the other thousands.
19 Not the havoc it creates at that instant in time --
20 THE COURT: Isn't that precisely what the
21 Secretary said so clearly in a marvelous opinion?
22 MR. DENSON: If it please the Court, that
23 is exactly it. You want to give everybody a chance.
24 I will agree with you. Let's have that chance. Let us
25 prove it here before your Honor whether it is good, bad

1 eorf 4

2 or indifferent.

3 THE COURT: You mean you want to bring the

4 Concorde into Court?

5 MR. DENSON: That might be a little difficult,

6 your Honor. You could get the nose in the door, I think,

7 but that is about it.

8 THE COURT: How can we have an evidentiary

9 hearing without trying it out?

10 MR. DENSON: Sir, I am not responsible for the

11 procedural posture of this case. Being an amicus, I don't

12 have anything to do with that. I would love to have had

13 something to do with it, but I wasn't accorded that

14 opportunity. That is water under the dam at this juncture.

15 The point is, if we want to address ourselves

16 to the question of giving everybody a fair chance, which

17 I think is fundamental, we should give everybody a fair

18 chance. We can have a hearing before your Honor as to

19 the pros and cons of this matter, but you would never hear

20 the end of the screaming that would arise from the airlines

21 if your Honor wanted to order such a thing. They would say,

22 "We have already submitted all this matter before

23 Secretary Coleman."

24 Well, your Honor knows a hearing before you

25 and a hearing before Secretary Coleman is certainly

1 eorf 5

2 a horse of a different color. I can tell you right now
3 that the hearing that we would get here as to an expose
4 of all the issues would be one thing and an administrative
5 determination, after seven hours, that is the thing
6 that just galls me, they act like it was a magnificent
7 operation on the part of the Secretary to sit for seven
8 hours.

9 Your Honor has already sat for almost four
10 here now and I know you are tired of listening to me
11 already, but the point is you don't dispose of a matter
12 that is of as serious a consequence as the issue that is
13 being presented here in a matter of seven hours.

14 THE COURT: Mr. Denson, will you explain to me
15 how anybody can have a fair trial without a test landing?
16 Explain that to me. I don't get it.

17 MR. DENSON: I will be happy to do that. May
18 it please the Court, we will start out with this:

19 The measurement of sound. Now, sound is
20 energy, it is measured in decibels. The scientists have
21 got a lot of conglomerations of whether it is effective
22 perceived decibels or whether it is perceived decibels or
23 whether it is effective decibels and all that stuff,
24 but sound is emitted from a source. According to the data
25 that was furnished by the manufacturers of the Concorde

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itself, their own data, the energy that was emitted by the Concorde's engines when they started out to make a takeoff was in excess of 4 and some of them even said up to 10 times the amount of energy that was emitted by the loudest subsonic jet.

Now we know, your Honor, and everybody has been crying about us poor people who live around Kennedy Airport, and Mr. Wells tells you in strong terms that we are not fighting the Concorde, we are fighting the Airport.

THE COURT: It is quite true, isn't it?

MR. DENSON: Partially, partially, partially. We certainly do not wish to increase our burden any more by the Concorde. We're doing the best we can with what we have got, but let's get back. You wanted to know how you can tell what would be a basis for you to make a decision or a determination of that without letting it in here.

Now, if you have people who are suffering from a plane that emits 107, this is by way of example, your Honor, 107 decibels, and you are being asked, what would be the expected impact of a plane which emits 4 to 10 times that amount of energy, I would say in your court, your Honor, he would be competent to testify about the discomfort that he is being subjected to

1 eorf

2 as a result of it.

3 I don't want to prove the whole case right

4 now --

5 THE COURT: I think I get your point. I will

6 receive the rest of your points on your brief. I will

7 reread it again.

8 I am going to reserve decision on this

9 application, but I don't intend to hold it for a year.

10 If there is any additional submission, I would appreciate

11 it if all parties would get their submissions before me on

12 or before May 6th and I will receive any communications

13 any interested party may wish to supply on any of the

14 matters that have been developed or lurk in the distance.

15 (Adjourned at 1:30 p.m.)

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2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -x

5 BRITISH AIRWAYS BOARD and :
COMPAGNIE NATIONALE AIR FRANCE,
6 :
Plaintiffs,
7 :
- against - 76 Civ. 1276
8 :
THE PORT AUTHORITY OF NEW YORK AND
9 NEW JERSEY; WILLIAM J. RONAN; :
W. PAUL STILLMAN; JAMES G. HELIMUTH;
10 VICTOR R. YANITELLI; ANDREW C. :
AXTELL; GEORGE F. BERLINGER; MILTON
11 A. GILBERT; ROBERT R. DOUGLASS, :
JAMES C. KELLOGG, III; GUSTAVE L.
12 LEVY; MATTHEW NIMETZ; ALAN SAGNER, :
Commissioners of the Port Authority
13 of New York and New Jersey, :
14 Defendants. :

15 -x

16 New York, New York
17 May 20, 1977 - 2:00 p.m.

18 B e f o r e:

19 HONORABLE MILTON POLLACK,

20 District Judge.

21

22 A p p e a r a n c e s:

23 WILLIAM C. CLARKE, Esq.
Attorney for Plaintiff British Airways
24 Board
245 Park Avenue
25 New York, New York 10017
BY: PETER JOHN NICKLES, Esq., and
JOHN MICHAEL CLEAR, Esq., of Counsel.

(Cont'd.)

Appearances: (Cont'd.)

ROGER & WELLS
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BY: STANLEY GODOFSKY, Esq.,
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- - -

THE COURT: The Court has received a proposed form for the judgment in respect to the decision heretofore made, both from the moving parties, the plaintiffs, and from the opposing parties, the defendants.

As I read these papers, apparently both sides are agreed on the language which would carry into effect the Court's order except as to the last paragraph in each submission. In other words, there is no semantic controversy concerning the remainder of the proposed judgment.

On behalf of the plaintiffs, is that correct?

MR. GODOFSKY: Yes.

THE COURT: On behalf of the defendants, is that correct?

MR. NICKLES: Yes.

MR. FALVEY: Yes, your Honor.

THE COURT: Accordingly, the Court will accept the language submitted by the parties insofar as it has thus been agreed upon and will hear the parties separately in connection with their respective additions.

Who will speak for the plaintiff?

MR. GODOFSKY: I will, your Honor, on the first paragraph.

If it please the Court, my name is Stanley

Godofsky and I appear this afternoon on behalf of Air France.

Before I turn to the proposed form of judgment, I would like to convey to the Court Mr. Wells' regrets that he can't be with us this afternoon, but he is recouperating from an operation.

Turning now to the proposed decree, the paragraph which plaintiffs have submitted and which the Port Authority objects to, is a decretal provision which requires the Port Authority to take all steps and perform all acts necessary to facilitate the operation of the Concorde aircraft to, from, and at, JFK International Airport in accordance with the order of Secretary Coleman and plaintiffs' amended operating specifications.

The purpose of the provision is simple. It's ancillary to the other provisions of the decree and is intended to prevent inaction by the Port Authority where action is either necessary or appropriate to the proper conduct of Concorde flight operations as provided by Secretary Coleman.

Frankly, we do not understand why the Port Authority objects to the provision. We believe it perfectly appropriate and within the scope of the Court's ruling.

THE COURT: Did you ask for that type of relief in the complaint?

MR. GODOFSKY: We did not specify specifically, your Honor. We did ask for all --

THE COURT: Did you specify directly or indirectly?

MR. GODOFSKY: Yes. In our complaint we asked for such other and further relief as to the parties as the Court may deem just and proper under the circumstances.

THE COURT: What facts or circumstances make it just and proper for me to enter a mandatory injunction of that character on the assumption that the Court's order will be disobeyed?

MR. GODOFSKY: I am not suggesting that the Court's order will be disobeyed.

THE COURT: Then why should I anticipate, by a paragraph in the proposed judgment that you submitted, any such thing?

MR. GODOFSKY: Frankly, your Honor, we are all aware of the controversy and the emotionalism generated by this suit.

THE COURT: I didn't know that the Port Authority expressed any emotion.

MR. GODOFSKY: I wasn't talking about the Port

Authority as such. I was talking about the surrounding atmosphere.

THE COURT: Are we trying this case to the amphitheater or are we trying this case in court between the parties?

MR. GODOFSKY: We are trying this case in court between the parties, but we think it will be very helpful in the orderly conduct of the experiment which your Honor has ordered to have everyone understand that the experiment is to proceed in an orderly fashion so we do not have to come back here later on and argue whether the Authority should or should not take the steps which are normally required to allow the experiment to proceed.

THE COURT: I am perfectly willing at the inception to assume that the actions of the Port Authority will in all respects be orderly and appropriate.

MR. NICKLES: Your Honor, could I make one point.

The problem, or potential problem, that at least prompted our interest in this particular paragraph is the position as expressed by the Port Authority at the oral argument on the summary judgment motion with respect to route-proving flights.

You will see in our last paragraph we

specifically mentioned the route-proving flights.

You will recall oral argument on the summary judgment motion, the representatives of the Port Authority took the position which we believe is contrary to the Chicago convention, the specific terms of Secretary Coleman's decision, but indeed they took the position that route-proving flights were not authorized.

It is anticipated by the airlines that route-proving flights are both appropriate in the circumstances prior to the commencement of the regularly scheduled commercial flights, so there would be no doubt, it would appear to us to be appropriate, without any reflection on the emotionalism or otherwise, that the fine representatives of the Port Authority thought it would be appropriate to have that last paragraph in the judgment.

THE COURT: Is this proposed judgment that you submitted correct insofar as reciting the names of the new commissioners who have been substituted, or have you used the old form?

MR. GODOFSKY: We have a current box, your Honor.

THE COURT: Mr. Falvey.

MR. FALVEY: Your Honor, with reference to the proposed decretal paragraph that we have been discussing,

my objection to it was essentially twofold. With your usual precision, you pinpointed the first, namely, that this third mandatory injunction was not encompassed within the complaint specifically. Your opinion says that the plaintiffs are entitled to the injunction and order, declaration and injunction prayed for, and that is why we have no objection to the first two paragraphs. They contain the declaration and the injunction prayed for in the complaint.

The third paragraph is not within the four corners of the complaint, in addition to which --

THE COURT: Even the first two paragraphs do not track the prayers for relief in the complaint exactly, but you are satisfied that the language is materially the same?

MR. FALVEY: Yes, I am, your Honor.

I would make further reference to the dispute paragraph. I would say that I would have great difficulty in interpreting it and you would have great difficulty in enforcing it because of the language included in there which directs us to take all steps and perform all acts necessary to facilitate the operation of the Concorde.

Very frankly, your Honor, I don't know what that means, and I don't know what it adds to the present

tentative injunction that would be incorporated in the second paragraph.

With reference to route-proving flights referred to by Mr. Nickles, we took the position on oral argument and on brief that we were not preempted either from route-proving flight approval or scheduled flights. You have ruled to the contrary, and if the route-proving flights are permitted under the Coleman decision, we would be enjoined under the second paragraph, to which we have no objection, from in any way interfering with the route-proving flights.

Again, because it wasn't prayed for and because it was ambiguous and unenforceable, I reiterate our objection toward the third decretal paragraph.

THE COURT: I see no occasion for the inclusion of the third prragraph submitted in the proposed judgment of the plaintiffs, and that will be stricken.

I just want to be sure that I have with me your proposed form of judgment in which you ask for additional relief, Mr. Falvey. What color did you submit that on the back? Did you submit one with a back on it?

MR. FALVEY: I believe we did.

THE COURT: Is it any of these? There are so many different pieces of paper submitted here.

Did you file your papers in the clerk's office, or did you send it to me?

MR. FALVEY: Sent it to you. That is the form.

THE COURT: Is that the form in which you submitted it?

MR. FALVEY: Yes.

THE COURT: I just wanted to be sure I had the right one.

I take it you have a further application, Mr. Falvey?

MR. FALVEY: Yes, I do, your Honor, and that is, with reference to the last paragraph of the form of order that we have submitted, in which we asked that this Court stay the effect of the injunction, which would be included in the order, until defendants have an opportunity to appeal to the Second Circuit and move that court for a stay of the injunction pending disposition of the appeal.

With reference to that, I am frankly a little surprised that the plaintiffs have objected to that. Their affidavit in opposition states they do not contemplate starting commercial flights, that is, Air France, until June 20, and what we are asking basically is that they agree with us not to put the pressure on this

Court and on the Second Circuit which would arise if the injunction were issued without a stay. If it were issued without a stay, my understanding is that the position of the plaintiffs is that they could commence Concorde flights at any time, tomorrow, Sunday, Monday, at any time, until that injunction is stayed.

We would be asking the Circuit Court of Appeals to grant a stay during the pendency of the appeal, assuming, of course, that the stay were granted, the appeal would be expedited and we, of course, would cooperate in every way to expedite the appeal.

We have additional grounds in support of the application for a stay, your Honor, which was set forth in our memorandum, and I hope you have had an opportunity to review that, and I would be pleased to respond to any questions you might have with regard to it.

THE COURT: What, in brief, to your knowledge, is a reason for a stay in a matter of this kind that has been dragging for almost a year, if not over a year?

MR. FALVEY: I think that fact supports our application.

THE COURT: In other words, you think you should receive a premium for having delayed the matter for a year?

MR. FALVEY: I think it ill behooves the plaintiffs to urge that a stay will irreparably harm them when they filed the suit in March of '76 and didn't bring on their argument for summary judgment until April 28, 1977. Now they are claiming that a stay between now --

THE COURT: I thought the Port Authority had requested three successive adjournments to consider its position at successive meetings, and I recall next to the last meeting being told that the Port Authority would definitely make up its mind as to what it was going to do before the next adjourned meeting with the Court and would inform the Court; and the next thing I heard about that was the Port Authority adjourned without dealing with the matter; so how can you say the plaintiffs have been delaying?

MR. FALVEY: In between the meeting in your courtroom, your Honor, and the date for oral argument, the plaintiffs submitted revised operating procedures to us which we did not have time to review and analyze so that our board could act on a fully informed basis; but at no time did I object to bringing on the argument for summary judgment.

THE COURT: That was consistent with the idea that neither you nor your adversaries wanted a

determination of the matter, either by the Port Authority or the Secretary, but was going to pass it to the Court.

MR. FALVEY: I don't believe that was my perception of the matter, your Honor.

THE COURT: That is what the minutes say. The minutes say the buck was being passed all around and it finally landed in the Court's lap.

MR. FALVEY: I think the question of a stay is unnecessarily being pressed on you by my opponents because, as I said earlier, they are not planning to start flights until June 20. Why in the world would they want authority to start tomorrow morning or Sunday morning or Monday morning; I don't understand that.

THE COURT: Mr. Godofsky, what do you say to that?

MR. GODOFSKY: Mr. Nickles would like to respond to that, but before he does, let me say that June 20 is the scheduled date for the start of commercial operations. Before then, we are going to have to have some of these route-proving flights that your Honor has heard about, and those are scheduled to start no later than the end of this month.

I would assume the Port Authority would not want us to commence those operations without preliminary

1 route-proving flights first, and we are not talking
2 about June 20, which is a month away; we are talking
3 about no later than May 31.
4 Mr. Nickles wants to make a few comments.
5 Then I would like to address myself to the Court.
6 MR. NICKLES: Your Honor, the thrust of
7 Mr. Falvey's comment was that we were putting pressure on
8 the Court. He suggested, I think, by his remarks, that
9 perhaps the Court of Appeals was going to decide this
10 matter next week and therefore there would be no delay.
11 As his order indicated, your Honor, he asked
12 for a stay pending the disposition of the appeal.
13 Now, Concorde flights into Dulles, your Honor,
14 commenced one year ago, May 20, 1976, and in addition to
15 the usual test which this Court has applied with respect
16 to the granting of the stay, I would note four particular
17 facts that seem to me appropriate, your Honor.
18 First, with respect to the massive litigation
19 that followed upon the heels of Secretary Coleman's
20 decision in the federal courts of the District of
21 Columbia, request for stays of those flights into Dulles
22 Airport were denied at every level of the district courts,
23 the district court level for the federal and the Court
24 of Appeals and by Chief Justice Burger.
25

1 rkas

2 Secondly, under the operations specifications,
3 Secretary Coleman has provided explicitly that the
4 permission to operate Concorde may be revoked immediately
5 in the event of an emergency deemed harmful to the health,
6 welfare, or safety of the American people; and, moreover,
7 under Article 7 of the Concorde Operating Specifications,
8 the FAA is empowered, in fact has primary jurisdiction,
9 to impose additional noise-abatement procedures to protect
10 the public interest.

11 We won't rediscuss the merits because I don't
12 think the Port Authority has raised any new insights into
13 the issues, and I don't believe the Port Authority can
14 show a substantial likelihood of prevailing on the merits
15 of their appeal.

16 More than that, when one gets to the question
17 of irreparable injury, we have submitted an affidavit;
18 and this Court noted and Secretary Coleman noted that the
19 additional impact of all the flights would be marginal
20 at best. This Court noted from the decision of Secretary
21 Coleman that one might increase the total noise around
22 an airport more than it will be increased by the proposed
23 Concorde flight simply by adding a few extra flights by,
24 say, B 707's or DC 8's.

25 Further, your Honor, Secretary Coleman

indicated that this was in the national interest to get the experiment started. The government is awaiting the results of the experiment to develop SST regulations, and the government is being sued in Washington for its delay in adopting SST regulations. Thirty days after the end of the experiment, the government will adopt those SST regulations. Secretary Coleman found that the commencement of the experiment was in the national interest of the United States in furtherance of the foreign relations of the United States. Secretary Coleman and the federal government looked to this experiment to determine the economic advisability, commercial acceptability, and the environment for the Concorde.

It seems to me under the standard test, indeed, in the unique circumstances here, the Port Authority could make out no case for a stay.

MR. GODOFSKY: Your Honor, I would only add to that the fact that the Port Authority has not even submitted an affidavit asserting in conclusionary fashion that it will suffer irreparable injury without a stay.

On the other hand, Air France has submitted an affidavit which shows on its face that it will not only suffer very, very substantial monetary losses if the delay of one year continues on into the future, but also

that --

THE COURT: What prejudice would you suffer if this delay continued until next Tuesday?

MR. GODOFSKY: You mean three days?

THE COURT: Yes.

MR. GODOFSKY: We are not planning to fly this the next three days, but we don't see any basis on which the Port Authority needs relief for the next three days. If they want to apply to the Court of Appeals for a stay, they have plenty of time to do it before Tuesday. Nothing is coming in over the weekend. No proving flights, no commercial flights. There is no basis in the record on which a stay should be granted.

THE COURT: It seems to me that for the sake of good order and regular procedure, and in view of the fact that a regular session of the Court of Appeals to hear motions is scheduled for May 24, 1977, that if there is any concern such as expressed by Mr. Falvey that you are planning to fly planes in here this afternoon, tomorrow, or Sunday or Monday, that no serious prejudice can occur from the ruling which I am about to make.

The history of defendants' delay herein in reaching a decision on its position, although in its March 11, 1976, resolution it announced, in effect, that

it was seeking only a six-month period to look into the matter, doesn't commend itself to further indulgence by this Court.

However, to give the defendants a reasonable opportunity to apply for relief in the Court of Appeals, a stay is hereby granted of the order and judgment which I will enter this afternoon until 4 p.m. on Tuesday, May 24, 1977, and conditioned that the defendants shall promptly file notice of appeal from the order and judgment of this Court and proceed with expedition thereunder.

The provision that I have just recited will be included with the agreed provisions as expressed by the two parties, and the order will be amended and signed and filed this afternoon.

I believe that concludes the matters to be presented to the Court.

MR. DENSON: May it please the Court.

Sir, we have not been furnished any copy of the proposed order of judgment which your Honor proposes to sign this afternoon, and the best I have at this time is the notes that I have made based upon the discussion here.

THE COURT: I have extra copies up here that were given to me by lawyers that I don't need, and you are welcome to them if you will wait a moment while I sort

them out when I get back into the robing room and send them out.

MR. DENSON: What we intend to do is to renew our motion to intervene based upon your Honor's order of July 6, 1976.

THE COURT: Motion denied.

MR. DENSON: May we file the papers?

THE COURT: You certainly may, and I will endorse them accordingly.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE, Plaintiffs, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et. al., Defendants.	76 Civ. 1276 (MP) Notice of Appeal

Notice is hereby given that the Port Authority of New York and New Jersey and its Commissioners, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment declaring invalid the Port Authority's temporary ban on Concorde operations at John F. Kennedy International Airport and enjoining the enforcement of such ban, entered in this action on the 20th day of May, 1977.

Benjamin R. Deloste for
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Attorneys for British Airways Board

Rogers & Wells, Esqs.
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New York, New York 10017
Attorneys for Compagnie Nationale Air France

To: U.S. Court of Appeals for the Second Circuit, U.S. Court House
Foley Square
New York, New York

MOTION IN COURT OF APPEALS FOR STAY OF ENFORCEMENT OF DISTRICT COURT JUDGMENT AND ORDER PENDING APPEAL, DATED MAY 20, 1977 - Pg. 345-346

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE

Plaintiffs-Appellees,

v.

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, et. al.,

Defendants-Appellants.

- -X

CIVIL ACTION
No. 76 CIV 1276
(MP)

MOTION FOR STAY
OF ENFORCEMENT OF
JUDGMENT AND ORDER

SIRS:

The Port Authority of New York and New Jersey and its Commissioners, defendants-appellants herein, respectfully move this Court, pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, for an order staying enforcement pending the appeal in this cause, of the judgment of the District Court entered herein on May --, 1977, declaring invalid the Port Authority's temporary ban on Concorde operations at John F. Kennedy International Airport and enjoining the enforcement of such ban.

Application for relief from this judgment was made to the District Court on May --, 1977, which application was denied.

The reasons supporting this motion and the facts upon which they are based are shown in the attached affidavit of Patrick J. Falvey, General Counsel, The Port Authority of New York and New Jersey, attorney for Port Authority

defendants-appellants herein, and in the "Memorandum of Defendants-Appellants In Support of Motion To Stay Enforcement of Judgment", submitted herewith.

Dated: New York, New York
May 20th, 1977

PATRICK J. FALVEY
General Counsel
The Port Authority of New York
and New Jersey
One World Trade Center - 67S
New York, New York 10048

Tel: (212) 466-7698

Attorney for Defendants -
Appellants

ORDER OF COURT OF APPEALS EXTENDING THE STAY OF DISTRICT COURT JUDGMENT AND ORDER UNTIL ARGUMENT AND EXPEDITING THE ARGUMENT OF THE APPEAL, DATED MAY 24, 1977 - P. 347

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of May, one thousand nine hundred and seventy-seven.

British Airways Board and Compagnie Nationale Air France, Plaintiffs-Appellees

v.

The Port Authority of New York and New Jersey, William J. Ronan, W. Paul Stillman, James G. Ballinger, Victor R. Yanitelli, Milton A. Gilbert, James C. Kellogg, III, Alan Sagner, Joseph F. Cullman, III, et. al.,

Defendants-Appellants

Town of Hempstead, Incorporated, Village of Lawrence, Incorporated Village of Cedarhurst, Incorporated Village of Atlantic Beach, and Robert F. Chuck, Rose Gottesman, and Herbert Harkavy,

Applicants for Intervention-Appellants.

It is hereby ordered that the motion made herein by counsel for the

appellants

dated May 20, 1977 to stay enforcement of the judgment of the United States District Court for the Southern District of New York entered May 20, 1977

be and it hereby is granted to August and including June 1, 1977 on condition that the appeal is heard that day.

It is further ordered that the appellants shall file their briefs and joint appendix on or before May 27, 1977; a reply brief, if any, on or before 9:00 o'clock A.M. June 1, 1977; appellees shall file their brief on or before 12 noon, May 31, 1977 and the appeal shall be set for argument at 2:00 o'clock P.M. on June 1, 1977.

A. DANIEL FUSARO, Clerk

by Edward J. Guardaro
Senior Deputy Clerk

BEFORE: HON. STANLEY H. FUCHSBERG

HON. ELLSWORTH A. VAN GRAFEILAND
Circuit Judges

HON. WILLIAM C. MERRITT
District Judge

BEST COPY AVAILABLE

PLAINTIFFS' NOTICE OF MOTION FOR SUMMARY JUDGMENT
Pg. 348-349

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE Plaintiffs, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. RANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLASS, JAMES C. KELLOGG, III, GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER, Commissioners of the Port Authority of New York and New Jersey, Defendants.	76 Civ. 1276 (MP) NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of John A. Wells, sworn to July 12, 1976, and upon all prior pleadings and proceedings had herein, the undersigned will move this Court in Room 1306, United States Court House,

40 Centre Street, New York, New York, at two o'clock in the afternoon of September 13, 1976, for summary judgment in favor of plaintiffs, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that plaintiffs are entitled to judgment as a matter of law, and for such other relief as the Court deems just and proper.

Please take further notice that answering papers, if any, must be served on the undersigned not later than August 17, 1976.

Dated: New York, N.Y.
July 12, 1976

Yours, etc.

William C. Clarke, Esq.

William C. Clarke

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(212) 983-5352
-and-
COVINGTON & BURLING
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Attorneys for British Airways Board

ROGERS & WELLS

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Attorneys for Compagnie Nationale Air France

To: Patrick J. Falvey, Esq.
Attorney for Defendants
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New York, N.Y.
(212) 466-7698

AFFIDAVIT OF JOHN A. WELLS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - Pg. 350-353

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD and COMPAGNIE NATIONALE AIR FRANCE Plaintiffs, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. RANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLASS, JAMES C. KELLOGG, III, GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER, Commissioners of the Port Authority of New York and New Jersey, Defendants.	76 Civ. 1276 (MP) AFFIDAVIT

JOHN A. WELLS, being duly sworn, deposes and says:

1. I am a member of the firm of Rogers & Wells, attorneys for plaintiff Compagnie Nationale Air France. I

submit this affidavit in support of plaintiffs' motion for summary judgment.

2. No factual issue exists which is material to the disposition of this motion.

3. Plaintiffs rely, in part, on various documents (more fully identified in Schedule A annexed hereto) which are a matter of public record but which may not be readily available to the Court. Accordingly, for the convenience of the Court, I submit herewith true copies of each of those documents.

WHEREFORE, and for reasons assigned in plaintiffs' memorandum of law submitted herewith, it is respectfully submitted that plaintiffs are entitled to summary judgment granting the relief requested in their complaint as a matter of law.

John A. Wells

John A. Wells

Sworn to before me this

12 day of July, 1976

Notary Public

SIGMUND KATZ
Attorney & Counsellor at Law
No. 30-7177500
Qualified in Nassau County
Cert. filed with New York County Clerk
Commission Expires March 30, 1978

SCHEDULE A

Exhibit A	Decision and Order of Secretary of Transportation William T. Coleman, Jr., on Concorde Supersonic Transport, dated February 4, 1976.
Exhibit B	Order of John L. McLucas dated April 2, 1976, amending the Operations Specifications of British Airways and Air France, and the Operations Specifications issued pursuant to this Order to the two carriers for Concorde flight operations.
Exhibit C	Civil Aeronautics Board Order 74-4-17 transferring Foreign Air Carrier Permits to British Airways Board and two Foreign Air Carrier Permits issued pursuant to Order 74-4-17 to British Airways.
Exhibit D	Civil Aeronautics Board Order 69-12-58 granting amended Foreign Air Carrier Permit to Compagnie Nationale Air France, and a Foreign Air Carrier Permit issued pursuant to Order 69-12-58 to Air France.
Exhibit E	Air France, Foreign Air Carrier Permits, 7 C.A.B. 1 (1946)
Exhibit F	Airways (Atlantic) Limited--Permit to Foreign Air Carrier, 2 C.A.B. 181 (1940)
Exhibit G	Advisory Opinion of the Arbitral Tribunal Constituted in Virtue of the Compromise Signed at Rome on 3d June, 1964 by the Governments of the United States of America and of the Italian Republic, July 17, 1965
Exhibit H	Letter from Secretary of State Henry A Kissinger dated October 6, 1975 to Hon. William T. Coleman, Jr., Secretary of Transportation
Exhibit I	Pages 1-37 of Transcript of Proceedings held before Secretary of Transportation William T. Coleman, Jr., on January 5, 1976
Exhibit J	Opinion of the Department of Transportation and Federal Aviation Administration submitted to the Supreme Judicial Court of Massachusetts re: In the Matter of Senate Bill No. 1161 (as amended) Pending Before the House of Representatives of the Commonwealth of Massachusetts, undated

Exhibit K	Statement on Behalf of the Civil Aeronautics Board by its Counsel, submitted to the Supreme Judicial Court of Massachusetts re: In the Matter of Senate Bill No. 1161 (as amended) Pending Before the House of Representatives of the Commonwealth of Massachusetts, dated May 18, 1971
Exhibit L	Press Release by the Office of the Secretary of Transportation, dated March 24, 1976.

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED, SUBMITTED PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
Pg. 354-359

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD, et ano., Plaintiffs, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al., Defendants.	76 Civ. 1276 (MP)

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Rule 9(g) of the General Rules of this Court plaintiffs British Airways Board ("British Airways") and Compagnie Nationale Air France ("Air France") submit the following statement of material facts as to which they contend there is no genuine issue to be tried.

1. British Airways is a public corporation of the United Kingdom of Great Britain and Northern Ireland, and is a foreign air carrier engaged in foreign air transportation within the meaning of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq. (Complaint ¶ 4(a).)

(a) British Airways is a designated air carrier of the United Kingdom pursuant to the Air Service Agreement between the United States

of America and the United Kingdom, done at Bermuda, February 11, 1946, as amended (60 Stat. 1499, T.I.A.S. 1507) (the "Bermuda Agreement"), for the purpose of operating air services on certain routes named therein, including, inter alia, the route between London and New York. (Complaint ¶ 4(a).)

(b) British Airways is the holder of a foreign air carrier permit issued by the Civil Aeronautics Board ("CAB") pursuant to section 402 of the Federal Aviation Act (49 U.S.C. § 1372) and approved by the President of the United States, authorizing it, inter alia, to engage in foreign air transportation of persons, property and mail between London and New York. (CAB Order 74-4-17, approved by the President, April 2, 1974.) (Complaint ¶ 4(a).)

(c) British Airways is the holder of operations specifications issued by the Federal Aviation Administration ("FAA") pursuant to FAR 129 (14 C.F.R. § 129), which specify that it may conduct operations at New York through John F. Kennedy International

Airport ("JFK"), and which, pursuant to the Decision and Order of the Secretary of Transportation, February 4, 1976, have been amended to specify that it may conduct operations at JFK with Concorde aircraft subject to certain conditions and limitations. (Complaint ¶ 4(a).)

2. Air France is a public company of the Republic of France and is a foreign air carrier engaged in foreign air transportation within the meaning of the Federal Aviation Act. (Complaint ¶ 4(b).)

(a) Air France is a designated air carrier of France pursuant to the Air Transport Services Agreement between the United States of America and France, done at Paris, March 27, 1946, as amended (61 Stat. 3445, T.I.A.S. 1679) (the "Paris Agreement"), for the purpose of operating air services on certain routes named therein, including, inter alia, the route between Paris and New York. (Complaint ¶ 4(b).)

(b) Air France is the holder of a foreign air carrier permit issued by the CAB pursuant to section 402 of the Federal Aviation Act and approved by the President of the United States,

authorizing it, inter alia, to engage in foreign air transportation of persons, property and mail between Paris and New York. (CAB Order 69-12-58, approved by the President, December 11, 1969.) (Complaint ¶ 4(b).)

(c) Air France is the holder of operations specifications issued by the FAA pursuant to FAR 129, which specify that it may conduct operations at New York through JFK, and which, pursuant to the Decision and Order of the Secretary of Transporation, February 4, 1976, have been amended to specify that it may conduct operations at JFK with Concorde aircraft subject to certain conditions and limitations. (Complaint ¶ 4(b).)

3. The Port Authority of New York and New Jersey ("the Authority") is a body corporate and politic created as a joint agency of the States of New York and New Jersey by a compact (supplementing and amending an existing agreement of 1834 between the two States), entered into by the two States in April, 1921, and approved by joint resolution of Congress on August 23, 1921. It consists of twelve Commissioners, six appointed by the Governor of New York

and six appointed by the Governor of New Jersey, constituting a board and having a Chairman and Vice-Chairman elected from their number. Each Commissioner is a citizen of either the State of New York or the State of New Jersey, and each performs official functions on behalf of the Authority. The Authority maintains and operates JFK under lease from the City of New York. (Complaint ¶ 5.)

4. Certificates of airworthiness that satisfy the Bermuda and Paris Agreements and the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591 (the "Chicago Convention"), have been issued by the civil aviation authorities of the United Kingdom and France for Concorde aircraft. (Complaint ¶ 15.)

5. In 1975 British Airways and Air France submitted formal applications to the Federal Aviation Administration (FAA) for amendment of their "operations specifications" to specify the Concorde aircraft as a type of aircraft to be flown at JFK and Dulles, pursuant to the Federal Aviation Act. (Complaint ¶ 7.) These have been granted.

6. On February 4, 1976, William T. Coleman, Jr., United States Secretary of Transporation ("the Secretary"), rendered a Decision and Order authorizing plaintiffs to conduct limited scheduled commercial operations of the Concorde aircraft to and from the United States for a trial period not to exceed 16 months. (Complaint ¶ 6.)

7. The Secretary's Decision and Order ordered the Administrator of the FAA to amend the operations specifications of British Airways and Air France to permit, subject to the terms and conditions set forth in the Decision and Order, two Concorde flights a day by each plaintiff into and out of JFK and one Concorde flight a day by each plaintiff into and out of Dulles International Airport ("Dulles") in Virginia, serving Washington, D.C. (Complaint ¶¶ 6, 16.) The operations specifications were so amended on April 6, 1976.

8. By letter dated March 11, 1976, plaintiffs notified the Authority of their intention to schedule commercial flights at JFK beginning on or about April 10, 1976. (Exhibit A to Complaint.) (Complaint ¶ 8.)

9. On March 11, 1976, the Authority purported to deny permission to plaintiffs to operate the Concorde into or out of JFK, asserting, as grounds for its decision, a desire to make an independent evaluation of noise data and community reaction relative to the Concorde, based upon operating experience at Dulles Airport, Heathrow Airport in London, and Charles de Gaulle Airport in Paris. (Exhibit B to Complaint.) (Complaint ¶ 9.)

ORDER OF JOHN L. McLUCAS DATED APRIL 2, 1976, AMENDING THE OPERATIONS SPECIFICATIONS OF BRITISH AIRWAYS AND AIR FRANCE, AND THE OPERATIONS SPECIFICATIONS ISSUED PURSUANT TO THIS ORDER TO THE TWO CARRIERS FOR CONCORDE FLIGHT OPERATIONS. Pg. 360-368

DATE: APR 2 1976

IN REPLY REFER TO:

SUBJECT: Operations Specifications - Air France and British Airways

OFFICE OF THE ADMINISTRATOR

TO: Assistant Administrator, Europe, Africa and Middle East Region

Enclosed are the amendments to the operations specifications for British Airways and Air France pertaining to operations of the Concorde supersonic aircraft into the United States. Specific operating and scheduling conditions have been inserted into the operations specifications consistent with the February 4, 1976, decision of the Secretary of Transportation.

You will note that the amendments vary from the applications in several respects. The application and proposed amendments submitted by Air France on February 14, 1975, did not clearly identify those airports where regular Concorde service is authorized and those airports whith may serve only as alternates. The amendment as proposed by the carrier could be construed as authorizing regular Concorde service to Philadelphia International and Boston Logan International Airports. Such authorization has not been considered by the Federal Aviation Administration nor by the Secretary of Transportation. The amendment as approved permits regular Concorde service to only John F. Kennedy International Airport in New York and Dulles International Airport serving Washington, D. C. Commercial service to any other airport in the United States may not be provided without further authorization.

Also the amendment as proposed by Air France listed Logan International and Stewart as refueling airports. The designation as refueling airport has been deleted. This will ensure that flights may not be dispatched to destinations in the United States other than JFK and Dulles Airports.

The airports requested to be listed as alternates by Air France were Baltimore Washington International, Boston Logan International, Bangor International, Newark, Stewart, Philadelphia International, and Bradley International in Windsor Locks, Connecticut. The amendment to the operations specifications as approved lists these airports as alternates for Concorde operations for Air France. In addition, Dulles and JFK are listed as alternates to each other.

The British Airways request of February 19, 1975, proposed Baltimore Washington International, Bangor International, Bradley International, Newark, and Philadelphia International as alternate airports for that carrier's Concorde operations. The approved amendment to the operations specifications lists these airports as alternates for British Airways. In addition, JFK and Dulles are listed as alternates to each other.

With regard to charter flights by either of the carriers, Part F of the operations specifications is not amended. These amendments do not permit charter flights except those flights by the air carrier that may be in lieu of regularly scheduled operations authorized by these amendments.

It is directed that the operations specifications be issued to the carriers.

John L. McLucas

2 Enclosures

cc: NYIFO-1

OPERATIONS SPECIFICATIONS

FOREIGN FLAG AIR CARRIER

CONCORDE OPERATIONS

A. General Conditions.

1. The air carrier is authorized to conduct two Concorde flights a day, scheduled or chartered, to and from the John F. Kennedy International Airport, New York, New York, and one scheduled flight a day to and from the Dulles International Airport, Washington, D. C., for a period not to exceed 16 consecutive months.

2. The 16-month period for each airport begins on the day of the first regularly scheduled or chartered Concorde flight by either Air France or British Airways. The time period for each airport shall be computed separately.

3. The service authorized in paragraph 1 above shall terminate not later than 16 months after the commencement of such service by either Air France or British Airways and may be revoked at any time upon four months' notice, or immediately, in the event of an emergency deemed harmful to the health, welfare, or safety of the American people.

4. In accordance with FAA regulations (14 C.F.R. § 91.55), the Concorde may not fly at supersonic speed over the United States or any of its territories.

5. No flight may be scheduled for landing or takeoff in the United States before 7 a.m. local time or after 10 p.m. local time.

6. Except where weather or other temporary emergency conditions dictate otherwise, authorized flights must originate from Charles de Gaulle Airport.

7. The FAA may modify these conditions and the procedures of B and C immediately below or impose such additional noise abatement procedures as are safe, technologically feasible, economically justified, and necessary to minimize the noise impact, including, but not limited to, the thrust cutback on departure.

B. Noise Abatement Departure Procedures - John F. Kennedy International Airport

1. Within approximately 60 seconds after start of the takeoff roll, shut down afterburner and reduce power to establish a 3% climb gradient.

2. All turns after takeoff shall be away from populated areas in the airport vicinity.

3. After takeoff from Runway 31 Left, initiate a climbing left turn as soon as practicable.

Effective date APR 2 1976

OPERATIONS SPECIFICATIONS

FOREIGN FLAG AIR CARRIER 363a

CONCORDE OPERATIONS

C. Noise Abatement Departure Procedures - Dulles International Airport

1. Runways 01 Left, 19 Left and 30 will be utilized but this does not preclude the use of other runways traffic conditions permitting.

2. All runways - takeoff and climb to 500 feet above airfield level, shut down afterburner and reduce power to that needed to maintain a 3% climb gradient (approx. 800 feet/min). Maintain runway heading until advised by air traffic control.

3. Runway 01L - Maintain 3% climb gradient until reaching 1000 feet (after passing Sterling Park) then reapply full climb power and proceed in accordance with ATC clearance.

4. Runway 19L - Maintain 3% climb gradient until reaching 3000 feet (after passing Arcola) then reapply full climb power and proceed in accordance with ATC clearance.

5. Runway 30 - Maintain 3% climb gradient until reaching 1000 feet (after passing Arcola) then reapply full climb power and proceed in accordance with ATC clearance.

6. All runways - after reapplying full climb power, proceed in accordance with air traffic control clearances, expecting to join airway V44 at Lisbon intersection.

Effective date APR 2 1976

FOREIGN FLAG AIR CARRIER

32. AUTHORIZED AIRPORTS

R - REGULAR
A - ALTERNATE
P - PROVISIONAL
NA - NOT AUTHORIZED
RF - REFUELING

LOCATION		TYPE AIRCRAFT
ANCHORAGE INTL - ALASKA	R, A, RF	B707, B747
ATLANTA MUNICIPAL, GEORGIA	A, RF	B707, B747
BALTIMORE WASHINGTON INTL, MD.	A, P	B707, B747, A300
BANGOR INTERNATIONAL, MAINE	A, RF	B707, B747, A300
BIRMINGHAM MUNICIPAL, ALABAMA	A	B707
BOSTON LOGAL INTL, MASS	R, A, RF	B707, B747, A300
CHICAGO O'HARE, ILL	R, A, RF	B707, B747
GREATER CINCINNATI, OHIO	A	B707, B747
CLEVELAND HOPKINS INTL, OHIO	A	B707, B747
COLD BAY, ALASKA	A	B707, B747
COLUMBUS INTL, OHIO	A	B707
DALLAS/FT WORTH REGIONAL, TEX	A, RF	B707, B747
DENVER, COLORADO	RF	B707, B747
DETROIT METROPOLITAN WAYNE, MICH	A	B707, B747
EIELSON AFB, ALASKA	A	B707, B747
ELMENDORFF AFB, ALASKA	A, P	B707, B747
FAIRBANKS INTL, ALASKA	A, RF	B707, B747
GRAND JUNCTION, COLORADO	A	B707
GREAT FALLS INTL, MONTANA	RF	B707, B747
GUAM, AGANA	RF	B707
HILO GENERAL MANN, HAWAII	A	B707
HONOLULU INTL, HAWAII	RF	B707
HOUSTON INTERCONTINENTAL, TEX	R, A, RF	B707, B747
HOUSTON WILLIAM P. HOBBY, TEX	A	B707
INDIANAPOLIS MUNICIPAL, IND	A, RF	B707, B747
JACKSONVILLE, FLORIDA	A	B707, B737
KANSAS CITY INTL, MISSOURI	A	B707, B747
KING SALMON, ALASKA	A	B707, B747
LAS VEGAS MCCARRAN, NEVADA	A, RF	B707, B747
LONG BEACH, CALIFORNIA	A	B707
LOS ANGELES INTL, CALIFORNIA	R, A	B707, B747
LOUISVILLE STANDIFORD, KENTUCKY	A	B707
MEMPHIS INTL, TENN	A, RF	B707
MIAMI INTL, FLORIDA	R, A	B707, B737
MAJURO	RF	B707
MILWAUKEE GENERAL MITCHELL, WISC	A	B707, B747
MINNEAPOLIS ST PAUL INTL, MINN	A, RF	B707, B747
MONTGOMERY DANNELLY, ALABAMA	A, RF	B707
NEWARK, NEW JERSEY	A	B707, B747
NEWBURGH STEWART AIRPORT, NY	A, P, RF	B707, B747, A300
NEW ORLEANS INTL MOISANT, LA	A, RF	B707, B747
NEW YORK JF KENNEDY INTL, NY	R, A, RF	B707, B747, A300
NIAGARA FALLS INTL, NY	A, RF	B707, A300
ONTARIO INTL, CALIFORNIA	A, P	B707

Effective date APR 2 1976

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FOREIGN FLAG AIR CARRIER

32. AUTHORIZED AIRPORTS

R- REGULAR RF - REFUELING
A - ALTERNATE
P - PROVISIONAL
NA - NOT AUTHORIZED

LOCATION		TYPE AIRCRAFT
PAGO PAGO INTL	A, RF	B707
PALMDALE, CALIFORNIA	A, P	B707, B747
PHILADELPHIA INTL, PA	R, A	B707, B747
PHOENIX SKY HARBOR INTL, ARIZONA	A	B707, B747
PITTSBURGH, GREATER PITTSBURGH, PA	A	B707
SAIPAN INTL, ISLEY FIELD	A	B707
ST. LOUIS LAMBERT, MISSOURI	A, RF	B707, B747
STE CROIX ALEXANDER HAMILTON, VI	A	B707, B737, B747
SACRAMENTO METROPOLITAN, CALIF	A	B707, B747
SALT LAKE CITY MUNICIPAL, UTAH	A, RF	B707
SAN ANTONIO INTL, TEXAS	A	B707
SAN DIEGO INTL, CALIFORNIA	A	B707, B747
SAN FRANCISCO, CALIFORNIA	A, RF	B707, B747
SAN JUAN INTL, PUERTO-RICO	R, A, RF	B707, B737, B747, A300
SEATTLE TACOMA INTL, WASHINGTON	A, RF	B707, B747
SHEMYA AFS, ALEUTIANS	RF	B707, B747
SPOKANE INTL, WASHINGTON	A, RF	B707, B747
TAMPA INTL, FLORIDA	A	B707, B737
WAKE ISLAND	RF	B707
WASHINGTON DULLES INTL, D. C.	R, A, RF	B707, B747
WEST PALM BEACH INTL, FLORIDA	A, P	B707, B737
WINDSOR LOCKS BRADLEY INTL, CONN	A	B707, B747, A300
NEW YORK JF KENNEDY INTL, NY	R, A	Concorde
WASHINGTON DULLES INTL, D. C.	R, A	Concorde
BALTIMORE WASHINGTON INTL, MD	A	Concorde
BANGOR INTERNATIONAL, MAINE	A	Concorde
BOSTON LOGAN INTL, MASS	A	Concorde
NEWARK, NEW JERSEY	A	Concorde
NEWBURGH STEWART AIRPORT, NY	A	Concorde
PHILADELPHIA INTL, PA	A	Concorde
WINDSOR LOCKS BRADLEY INTL, CONN	A	Concorde

Effective date APR 2 1976

FAA Form 1014 (2-72)

OPERATIONS SPECIFICATIONS

FOREIGN FLAG AIR CARRIER 366 a

CONCORDE OPERATIONS

A. General Conditions.

1. The air carrier is authorized to conduct two Concorde flights a day, scheduled or chartered, to and from the John F. Kennedy International Airport, New York, New York, and one scheduled or chartered flight a day to and from the Dulles International Airport, Washington, D.C., for a period not to exceed 16 consecutive months.

2. The 16-month period for each airport begins on the day of the first regularly scheduled or chartered Concorde flight by either British Airways or Air France. The time period for each airport shall be computed separately

3. The service authorized in paragraph 1 above shall terminate not later than 16 months after the commencement of such service by either British Airways or Air France and may be revoked at any time upon four months' notice, or immediately, in the event of an emergency deemed harmful to the health, welfare, or safety of the American people.

4. In accordance with FAA regulations (14 C.F.R. § 91.55), the Concorde may not fly at supersonic speed over the United States or any of its territories.

5. No flight may be scheduled for landing or takeoff in the United States before 7 a.m. local time or after 10 p.m. local time.

6. Except where weather or other temporary emergency conditions dictate otherwise, authorized flights must originate from Heathrow Airport.

7. The FAA may modify these conditions and the procedures of B and C immediately below or impose such additional noise abatement procedures as are safe, technologically feasible, economically justified, and necessary to minimize the noise impact, including, but not limited to, the thrust cutback on departure.

B. Noise Abatement Departure Procedures - John F. Kennedy International Airport

1. Within approximately 60 seconds after start of the takeoff roll, shut down afterburner and reduce power to establish a 3% climb gradient.

2. All turns after takeoff shall be away from populated areas in the airport vicinity.

3. After takeoff from Runway 31 Left, initiate a climbing left turn as soon as practicable.

Effective date APR 2 1976

FAA Form 1014 (2-72)

CONCORDE OPERATIONS

C. Noise Abatement Departure Procedures - Dulles International Airport

1. Runways 01 Left, 19 Left and 30 will be utilized but this does not preclude the use of other runways traffic conditions permitting.

2. All runways - takeoff and climb to 500 feet above airfield level, shut down afterburner and reduce power to that needed to maintain a 3% climb gradient (approx. 800 feet/min). Maintain runway heading until advised by air traffic control.

3. Runway 01L - Maintain 3% climb gradient until reaching 1000 feet (after passing Sterling Park) then reapply full climb power and proceed in accordance with ATC clearance.

4. Runway 19L - Maintain 3% climb gradient until reaching 3000 feet (after passing Arcola) then reapply full climb power and proceed in accordance with ATC clearance.

5. Runway 30 - Maintain 3% climb gradient until reaching 1000 feet (after passing Arcola) then reapply full climb power and proceed in accordance with ATC clearance.

6. All runways - after reapplying full climb power, proceed in accordance with air traffic control clearances, expecting to join airway V44 at Lisbon intersection.

Effective date APR 2 1976

FOREIGN FLAG AIR CARRIER

32. Authorized Airports -

R - Regular
A - Alternate
P - Provisional
RF - Refueling
NA - Not Authorized

LOCATION		TYPE AIRCRAFT
KAHULUI AIRPORT, KAHULUI, HAWAII	A, RF	VC-10, B-707
STAPLETON INTL, DENVER, COLORADO	A	VC-10, B-707
DULLES INTL, CHANTILLY, VIRGINIA	R, A	VC-10, B-707, B-747
GREATER PITTSBURGH ARPT, PITTS, PA	A	VC-10, B-707
PAGO PAGO INTERNATIONAL, AMER SAMAO	A, P	VC-10, B-707
SAN ANTONIO INTL, SAN ANTONIO, TEXAS	A	VC-10, B-707
ANCHORAGE INTL, ANCHORAGE, ALASKA	R	VC-10, B-707, B-747
FAIRBANKS INTL, FAIRBANKS, ALASKA	A, P	VC-10, B-707, B-747
COLD BAY ARPT, COLD BAY, ALASKA	A	VC-10, B-707, B-747
GUSTAVUS AIRPORT, GUSTAVUS, ALASKA	A	VC-10, B-707
YAKUTAT AIRPORT, YAKUTAT, ALASKA	A	VC-10, B-707
KING SAIMON AIRPORT, KING SAIMON, ALASKA	A	VC-10, B-707
ELMENDORF AFB, ALASKA	A, P	VC-10, B-707, B-747
EIELSON AFB, ALASKA	A	VC-10, B-707
SHEMYA AFB, ALASKA	A	VC-10, B-707
SONDRESTROM AB, GREENLAND	A, RF	VC-10, B-707
SAN DIEGO INTL, SAN DIEGO, CALIF	A, P	VC-10, B-707, DC-10
SKY HARBOUR AIRPORT, PHOENIX, ARIZ	A	VC-10, B-707
SUNPORT/KIRTLAND AFB, ALBUQUERQUE,NM	A	VC-10, B-707
NIAGARA FALLS INTL, NIAGARA FALLS,NY	A, P	VC-10, B-707
STOCKTON METRO ARPT, STOCKTON, CALIF	A	VC-10, B-707
HOWARD AFB, CANAL ZONE	A	VC-10, B-707
SALT LAKE CITY INTL, SLC, UTAH	RF	DC-10
PALMDALE AF PLANT 42, CALIF	A	DC-10
KENNEDY INTL, NEW YORK, NEW YORK	R, A	Concorde
DULLES INTL, CHANTILLY, VA,	R, A	Concorde
BALTIMORE WASHINGTON INTL ARPT	A	Concorde
NEWARK AIRPORT, NEWARK, N. J.	A	Concorde
PHILADELPHIA INTL, PHILADELPHIA, PA	A	Concorde
BRADLEY INTL, WINDSOR LOCKS, CONN	A	Concorde
BANGOR INTL, BANGOR, MAINE	A	Concorde

Effective date APR 2 1976

CIVIL AERONAUTICS BOARD ORDER 74-4-17 TRANSFERRING FOREIGN AIR CARRIER PERMITS TO BRITISH AIRWAYS BOARD AND TWO FOREIGN AIR CARRIER PERMITS ISSUED PURSUANT TO ORDER 74-4-17 TO BRITISH AIRWAYS. Pg. 369-378

Order 74-4-17

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 19th day of March, 1974

Application of BRITISH AIRWAYS BOARD pursuant to section 402(g) of the Federal Aviation Act of 1958, for transfer of foreign air carrier permits held by British Overseas Airways Corporation, and for other relief.	Docket 26131

ORDER TRANSFERRING FOREIGN AIR CARRIER PERMITS

By Order 74-3-4, dated March 1, 1974, the Board directed all interested persons to show cause why the Board should not approve the transfer of British Overseas Airways Corporation's (BOAC) foreign air carrier permits to the British Airways Board (BAB).

The order required that all interested persons having objections to the issuance of an order making final the proposed findings and conclusions set forth therein state such objection within 10 days after service.

No answers to the show cause order have been received.

Accordingly, we conclude that the tentative findings and conclusions contained in Order 74-3-4 should be made final and that the public interest requires the transfer of BOAC's permits to BAB. 1/

ACCORDINGLY, IT IS ORDERED THAT:

1. The tentative findings and conclusions set forth in Order 74-3-4 be and they hereby are made final;

1/ The exercise of the rights granted by the transferred permits will be subject to the conditions presently made applicable pursuant to Orders 73-7-145, and 68-9-148.

2. The foreign air carrier permits held by British Overseas Airways Corporation, issued pursuant to Order E-26074, approved December 4, 1967, and Order 68-9-148, approved September 26, 1968, be and they hereby are transferred and reissued to British Airways Board;

3. Said permits shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and shall be effective on April 1, 1974;

4. The exercise of the privileges granted by said permits shall be subject to the terms, conditions, and limitations prescribed therein, those set forth below in subparagraphs (a) and (b), and such other reasonable terms, conditions and limitations required by the public interest as may from time to time be prescribed by the Board;

(a) With respect to the permit authorizing, inter alia, stopover privileges at Anchorage, Alaska, the holder shall file with the Board for the six months ending June 30 and December 31 of each year (within 60 days of the close of each period) a letter setting forth the number of passengers availing themselves of the stopover privilege, and shall separately file with the Board the name and address of each passenger not re-embarked, stating the reason therefor, if known;

(b) The holder shall comply with the conditions prescribed by ordering paragraph 3 of Order 73-7-145, approved July 26, 1973, or such modifications thereof as may hereafter be provided by the Board, without hearing, pursuant to regulation or order;

5. The foreign air carrier permits held by British Overseas Airways Corporation, issued pursuant to Order E-26074, approved December 4, 1967, and Order 68-9-148, approved September 26, 1968, be and they hereby are canceled effective upon the effective date of the permits issued herein to British Airways Board;

6. British Airways Board be and it hereby is authorized to use the trade name "British Airways," alone or in conjunction with the initials "BOAC";

7. This order shall become effective upon the date of its approval by the President of the United States; and

8. Copies of this order shall be served upon the British Airways Board, British Overseas Airways Corporation, British European Airways, British Airtours Limited, and the Ambassador of the United Kingdom of Great Britain and Northern Ireland.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND

Secretary

(SEAL)

THE WHITE HOUSE

APPROVED:

RICHARD NIXON

April 2, 1974

Issued pursuant to
Order 74-4-17

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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PERMIT TO FOREIGN AIR CARRIER
(as reissued)

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BRITISH AIRWAYS BOARD

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

1. Between the coterminal points London and Manchester, England, and Prestwick, Scotland, the intermediate points Shannon, Ireland; Iceland; Gander and Montreal, Canada; the Azores; Bermuda; and the coterminal points Boston, Mass., New York, N.Y., Philadelphia, Pa., Baltimore, Md., Washington, D. C., Chicago, Ill., and Detroit, Mich., and (a) between the intermediate points New York, N. Y.; the Bahama Islands; Cuba; Jamaica; and Panama; a point in Colombia; a point in Ecuador; the intermediate point Lima, Peru; and the terminal point Santiago, Chile; and (b) between the intermediate points New York, N. Y.; St. Kitts; Antigua; Dominica; St. Lucia; St. Vincent; Barbados; Grenada; Trinidad and Tobago; and the terminal point Guyana;

2. Between the terminal point London, England; the intermediate points New York, N. Y.; San Francisco, Calif.; Honolulu, Hawaii; Wake; and Tokyo, Japan; and the terminal point Hong Kong;

3. Between the terminal point the Bahama Islands, and the terminal point New York, N. Y.;

4. Between a point or coterminal points in the Bahama Islands and the coterminal points Miami and Palm Beach, Fla.;

5. Between the terminal point London, England; the intermediate point Chicago, Ill.; and the terminal points Los Angeles and San Francisco, Calif.;

6. Between the terminal point Bermuda and the coterminal points Baltimore, Md., Washington, D. C., New York, N. Y., and Boston, Mass.;

7. Between the terminal point London, England; the intermediate points New York, N. Y.; San Francisco and Los Angeles, Calif.; Honolulu, Hawaii; American Samoa; and Fiji; and coterminal points in Australia and New Zealand;

8. Between the terminal point London, England, and the terminal point Miami, Fla.

The holder hereof shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

This permit shall be subject to the following terms, conditions, and limitations:

(1) Only one of the California points designated on segment 5 and only one of the California points designated on segment 7 may be served at any given time. The holder shall have the right to substitute, at its option, Los Angeles for San Francisco and vice versa on each such segment: Provided, That one such substitution may be made at any time with respect to each such segment, and thereafter any further substitutions may be made only at intervals of no less than three years, upon six months' notice through diplomatic channels.

(2) All flights over segment 2 or 7 shall serve New York, N. Y.

(3) The holder shall not serve American Samoa and Fiji on the same flight: Provided, That this condition shall terminate upon the effective date of any exchange of South Pacific local service routes which may be agreed upon by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States.

(4) The holder shall serve Cuba; Panama; a point in Colombia; a point in Ecuador; Lima, Peru; Santiago, Chile; St. Kitts; Antigua; Dominica; St. Lucia; St. Vincent; Barbados; Grenada; Trinidad and Tobago; Guyana, and, except for flights over segment 3 or 4 of the above-described route, the Bahama Islands and/or Jamaica only on flights which originate or terminate at London or Manchester, England, or Prestwick, Scotland.

(5) The holder shall not serve Chicago, Ill., Detroit, Mich., Baltimore, Md., Washington, D. C., Philadelphia, Pa., and/or Boston, Mass., on any flight which serves the Bahama Islands; Cuba; Jamaica; Panama; a point in Colombia; a point in Ecuador; Lima, Peru; Santiago, Chile; St. Kitts; Antigua; Dominica; St. Lucia; St. Vincent; Barbados; Grenada; Trinidad and Tobago; or Guyana.

(6) The holder shall not grant stopover privileges at Chicago, Ill., on flights over segment 5.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the United Kingdom of Great Britain and Northern Ireland for British international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the United Kingdom of Great Britain and Northern Ireland shall be parties.

The exercise of the privileges granted hereby shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

This permit shall be effective on April 1, 1974. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the route authorized by this permit from the routes which may be operated by airlines designated by the Government of the United Kingdom of Great Britain and Northern Ireland, or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of the United Kingdom of Great Britain and Northern Ireland in lieu of the holder hereof, or (3) upon the termination or expiration of the Air Services Agreement between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland, effective February 11, 1946, as amended by exchanges of notes including an exchange of notes effective May 27, 1966: Provided, however, That clause (3) of this paragraph shall not apply if, prior to the occurrence of the event specified in clause (3), the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and the United Kingdom of Great Britain and Northern Ireland are or shall become parties.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 19th day of March, 1974.

EDWIN Z. HOLLAND

Secretary

(SEAL)

Issuance of this permit
to the holder approved by the
President of the United States
on April 2, 1974
in Order 74-4-17.

Issued pursuant to
Order 74-4-17

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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PERMIT TO FOREIGN AIR CARRIER
(as reissued)

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BRITISH AIRWAYS BOARD

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules and regulations issued thereunder, to engage in foreign air transportation as follows:

1. Between a point or points in the United Kingdom of Great Britain and Northern Ireland (United Kingdom) and the terminal point Anchorage, Alaska, with respect to persons, property, and mail.

2. Between a point or points in the United Kingdom and the intermediate point Anchorage, Alaska, and between the intermediate point Anchorage, Alaska, and the coterminal points Tokyo and Osaka, Japan, with respect to persons and their accompanied baggage.

This permit shall be subject to the following conditions:

(1) The foreign air transportation authorized over segment 1 of this permit shall be provided only on scheduled flights operated by the holder between a point or points in the United Kingdom, on the one hand, and Tokyo and Osaka, Japan, or Tokyo or Osaka, Japan, on the other hand.

(2) The holder in providing service over segment 2 of this permit shall be limited to disembarking at Anchorage, Alaska, passengers and their accompanied baggage transported by the holder on scheduled flights operated between a point or points in the United Kingdom, on the one hand, and Tokyo and Osaka, Japan, or Tokyo or Osaka, Japan, on the other hand, and moving under a passenger ticket and baggage check (or air waybill) providing for transportation between a point or points in the United Kingdom, on the one hand, and Tokyo and Osaka, Japan or Tokyo or Osaka, Japan, on the other hand: Provided, however, That such passengers and accompanied baggage are subsequently re-embarked by the holder in its aircraft on a scheduled flight operated between a point or points in the United Kingdom, on the one hand, and Tokyo and Osaka, Japan, or Tokyo or Osaka, Japan

on the other hand, and are transported in accordance with the original routing as specified in the ticket. Re-embarkation shall occur at any time during the validity of the ticket but in no event shall it occur later than one year from the date of disembarkation.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of the United Kingdom for British international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the United Kingdom shall be parties.

This permit shall be subject to the condition that in the event any practice develops which the Board regards as inimical to sound economic conditions, the holder and the Board will consult with respect thereto and will use their best efforts to agree upon modifications thereof satisfactory to the Board and the holder.

The exercise of the privileges granted hereby shall be subject to such other reasonable terms, conditions and limitations required by the public interest as may from time to time be prescribed by the Board.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

This permit shall be effective on April 1, 1974, and shall terminate on April 30, 1973: 1/ Provided, however, That if in the aforesaid period during which this permit shall be effective, the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement, to which the United States and the United Kingdom are or shall become parties, then and in that event this permit is continued in effect during the period provided in such treaty, convention, or agreement.

1/ On April 30, 1973 British Overseas Airways Corporation applied in Docket 25479 for renewal of its permit.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 19th day of March, 1974.

EDWIN Z. HOLLAND

Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on April 2, 1974
in Order 74-4-17.

CIVIL AERONAUTICS BOARD ORDER 69-12-58 GRANTING AMENDED FOREIGN AIR CARRIER PERMIT TO COMPAGNIE NATIONALE AIR FRANCE, AND A FOREIGN AIR CARRIER PERMIT ISSUED PURSUANT TO ORDER 69-12/58 TO AIR FRANCE. Pg. 379-383 Order 69-12-58

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 10th day of November, 1969

Application of COMPAGNIE NATIONALE AIR FRANCE for an amended foreign air carrier permit pursuant to section 402 of the Federal Aviation Act of 1958	Docket 21196

ORDER

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision;

IT IS ORDERED:

1. That an amended foreign air carrier permit in the form attached hereto be issued to Compagnie Nationale Air France;

2. That said permit shall be signed on behalf of the Board by its Secretary, shall have affixed thereto the seal of the Board, and shall be effective upon the effective date of this order;

3. That the exercise of the privileges granted by said permit shall be subject to the terms, conditions, and limitations prescribed by Part 203 of the Board's Economic Regulations and such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board;

4. That Eastern Air Lines' Motion for Leave to File an Otherwise Unauthorized Document be and it hereby is denied;

5. That Compagnie Nationale Air France's Motion for Leave to File an Otherwise Unauthorized Document be and it hereby is dismissed;

6. That, except to the extent granted, the application of Compagnie Nationale Air France, and all other requests herein, be and they hereby are denied; and

7. That this order shall become effective upon the date of its approval by the President of the United States.

By the Civil Aeronautics Board:

MABEL McCART

Acting Secretary

(SEAL)

THE WHITE HOUSE

APPROVED:

RICHARD NIXON

December 11, 1969

Issued pursuant to
Order 69-12-58

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

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PERMIT TO FOREIGN AIR CARRIER
(as amended)

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COMPAGNIE NATIONALE AIR FRANCE

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, as follows:

1. Between a terminal point in France, intermediate points in the United Kingdom, Ireland, Iceland, Greenland, Labrador and Newfoundland, Canada, the intermediate point Lisbon, Portugal, intermediate points in the Azores and Bermuda, and the coterminal points Boston, Mass., New York, N.Y., Philadelphia, Pa., and Washington, D. C.

2. Between a terminal point in France, intermediate points in the United Kingdom, Ireland, Iceland, Greenland, Labrador and Newfoundland, Canada, the intermediate point Lisbon, Portugal, intermediate points in the Azores, the intermediate point Montreal, Canada, and the terminal point Chicago, Ill.

3. Between a terminal point in Martinique, intermediate points in Guadeloupe, Antigua, and St. Martin, the intermediate point San Juan, Puerto Rico, intermediate points in the Dominican Republic and Haiti, and the terminal point Miami, Fla.

4. Between a terminal point in Martinique, an intermediate point in Guadeloupe, and the terminal point New York, N.Y.

5. Between a terminal point or points in France, intermediate points in the United Kingdom, Ireland, Iceland, Greenland, Labrador and Newfoundland, Canada, the intermediate point Lisbon, Portugal, intermediate points in the Azores and Bermuda, the intermediate points New York, N.Y., and Houston, Texas, and the coterminal points Guadalajara, Puerto Vallarta, and Mexico, D.F., Mexico.

6. Between a terminal point in France, the intermediate point Hamburg, Germany, and the terminal point Anchorage, Alaska.

7. Between a terminal point or points in France and the terminal point Los Angeles, Calif.

The holder hereof shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of France for French international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and France shall be parties.

By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

The holder shall keep on deposit with the Board a signed counterpart of C.A.B. Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The exercise of the privileges granted hereby shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be effective on December 11, 1969.
Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the routes hereby authorized from the routes which may be operated by airlines designated by the Government of France, or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of France in lieu of the holder hereof, or (3) upon the termination or expiration of the Air Transport Services Agreement between the Government of the United States and the Government of

France, effective on March 27, 1946, as amended by exchanges of notes, effective July 11, 1950, March 19, 1951, August 27, 1959, April 5, 1960, and May 29, 1969: Provided, however, That if prior to the occurrence of the event specified in clause (3) of this paragraph, the operation of the foreign air transportation herein authorized becomes the subject of any treaty, convention, or agreement to which the United States and France are or shall become parties, then and in that event this permit is continued in effect during the period provided in such treaty, convention, or agreement.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by the Secretary of the Board, and the seal of the Board to be affixed hereto, on the 10th day of November, 1969.

MABEL McCART

Acting Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on December 11, 1969
in Order 69-12-58.

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AIR FRANCE, FOREIGN AIR CARRIER
PERMITS, 7 C.A.B. 1 (1946)
Pg. 384-395

DOCKET No. 2287

AIR FRANCE, FOREIGN AIR CARRIER PERMITS

Decided June 7, 1946

Applicant granted foreign air carrier permits authorizing air transportation: (1) between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, and the coterminal points Boston, Mass., New York, N. Y., and Washington, D. C., provided that Prestwick, Scotland; Reykjavik, Iceland; Goose Bay, Labrador; the Azores, and Bermuda may be included as intermediate points if and when required by weather conditions; (2) between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, the intermediate point Montreal, Canada, and the terminal point Chicago, Ill., provided that Prestwick, Scotland; Reykjavik, Iceland; Goose Bay, Labrador; and the Azores may be included as intermediate points if and when required by weather conditions; (3) between a terminal point in Martinique, intermediate points in Guadeloupe, Antigua, and St. Martin, the intermediate point San Juan, P. R., an intermediate point in the Dominican Republic, and a terminal point in Haiti; and (4) between a terminal point in Indochina, intermediate points in China, the intermediate point The British Crown Colony of Hong Kong, and the terminal point Manila, Philippine Islands.

APPEARANCES:

Frank J. Foley for Air France.
Henry J. Friendly and *J. Howard Hamstra* for Pan American Airways, Inc.
William Blum, Jr., for the Port of New York Authority.
E. B. Mittleman for H. W. Brown, President, International Association of Machinists.
V. Rock Grundman, Public Counsel.

OPINION

BY THE BOARD:

Air France filed an application for air carrier permits authorizing the transportation by air of persons, property, and mail in scheduled service over five routes as follows: (1) between France and Boston, Mass., New York, N. Y., Washington, D. C., and the site of United Nations Organization, via intermediate points over

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the North Atlantic; (2) between France and Chicago, Ill., via intermediate points over the North Atlantic and Montreal; (3) between France and Mexico via intermediate points over the North Atlantic and New York; (4) between Martinique and Haiti via Guadeloupe and other intermediate points, including intermediate points in Puerto Rico and the Dominican Republic, and (5) between Indochina and Manila via points in China and Hong Kong (subject to the approval of the Government of the Philippine Islands).

A copy of the application was transmitted to the President of the United States as required under section 801 of the Civil Aeronautics Act of 1938, as amended, and thereafter, upon due notice to the public and all interested parties, a public hearing was held before Examiner Barron Fredricks. Pan American Airways, Inc., and Eastern Air Lines, Inc., were permitted to intervene. The issuance of an examiner's report, and the filing of exceptions and briefs were waived by all the parties except insofar as applicant's route No. 3 is concerned. Air France requested that its application for such a route be severed from the instant proceeding in order to avoid delay in the decision on the remaining proposals, and that decision thereon be reserved for separate disposition at a later date, after all procedural steps have been followed.

This request was agreed to by all parties to the proceeding and we will therefore defer consideration of applicant's proposed route No. 3 to a later date, following further proceedings after notice to all parties.

Consideration of the application is governed by section 402 of the Act, paragraph (b) of which provides that the Board is empowered to issue a permit to a foreign air carrier if it finds that the carrier is fit, willing, and able properly to perform the proposed air transportation and to conform to the provisions of the Act and to the rules, regulations, and requirements of the Board thereunder, and that such transportation is in the public interest.[1] Paragraph (f) of the same section provides that the Board may prescribe the duration of any permit and may attach to the permit such reasonable terms, conditions, or limitations as in its judgment the public interest may require. Section 1102, among other things, directs the Board in exercising and performing its powers and duties under the Act to do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries.

There is presently in force a bilateral air transport agreement between the United States and France which was signed in Paris on March 27, 1946. Under this agreement the Government of France enjoys the right to conduct air transport services by one or more air carriers of French nationality designated by France

[1] The meaning of public interest as used in section 402 of the Act has been stated by the Board and need not be discussed here. *Canadian Colonial Airways, Ltd., Air Carrier Permit*, 3 C.A.B. 50 (1941).

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on specified routes which transit or serve commercially the territory of the United States and the United States enjoys corresponding rights with respect to specified routes to be served by air carriers of its nationality. The specification of routes for operation by French carriers is in the following terms:

Routes to be served by the air carriers of the French Republic (points on any of the routes may, at the option of the air carrier, be omitted on any or all flights).

1. France via intermediate points over the North Atlantic[2] to Boston, New York, and Washington, and also the site of the United Nations Organization; in both directions.
2. France via intermediate points over the North Atlantic and Montreal to Chicago; in both directions.
3. France via intermediate points over the North Atlantic to New York and beyond to Mexico; in both directions.
4. Martinique via Guadeloupe and via intermediate points to Puerto Rico, and beyond via the Dominican Republic to Haiti; in both directions.
5. Indochina via points in China and Hong Kong to Manila; in both directions (provided that this route is subject to the approval of the Government of the Philippine Islands).

Air France was organized August 30, 1933, as a corporation under the laws of France for the purpose of operating air lines in French territory and abroad. It has an authorized capital of 120 million francs represented by 240,000 shares of stock of the value of 500 francs per share; and, in addition, 80,000 no-par-value, profit-participating shares which are assigned to the French State. Of the 240,000 shares of 500 francs value per share, 239,400 were to be assigned to four air transport companies—Air Orient, Air Union, Compagnie Internationale de Navigation Aerienne, and Societe Generale de Transport Airien—which under the terms of Air France's articles and bylaws, contributed their assets to Air France in consideration of that corporation's assumption of the liabilities of each of the contributing companies. In 1945 the ownership of the shares of Air France was transferred to the French Government, subject to the provision that a maximum of 40 percent of the stock might be assigned to specified types of organizations of French nationality.[3] From the evidence of record it is clear that the French Government holds substantial ownership and effective control of Air France.

Under date of April 12, 1946, the French Minister of Public Works and Transportation designated Air France to operate international air services with respect to persons, property, and mail on all five of the routes described in the portion of the bilateral agreement of March 27, 1946.

Since November 29, 1944, the administration of the affairs of Air France has been entrusted to provisional administrators ap-

[2] For the purposes of the present schedule, the term "North Atlantic" shall mean that part of the North Atlantic Ocean north of a line from Key West, Fla., to Bermuda, the Azores, and Lisbon, including these points.

[3] The legal provisions to this effect took account of the fact that a block of the stock amounting to less than 5 percent was already vested in a foreign government, and required that this holding be included in the calculation of the 40 percent assignable to persons other than the French Government.

pointed by a French court, who have, in turn, selected Henri Desbrueres as the applicant's general manager.

Prior to World War II, Air France operated air transport services within France and between that country and points elsewhere in Europe and in Africa, South America, and Asia. In 1938, with 100 aircraft and 4,000 employees, the company operated about 41,000,000 passenger-miles and 1,100,000 ton-miles of mail and cargo. During the war the company served France and the United Nations under military control. The re-establishment of regular commercial services followed the liberation of France, and at present Air France has about 6,000 employees and 70 planes. The applicant proposes to inaugurate service between Paris and New York in June or July, utilizing Douglas DC-4 aircraft. Service over the Indochina-Manila route is contemplated as soon as authority can be obtained from the Philippine Government. The Caribbean service is not proposed until equipment can be obtained, now expected in September. On the basis of the operating history of Air France and the facts of record we find that this company is fit, willing, and able to render the service proposed and to conform to the provisions of the Act and the rules, regulations, and requirements of the Board thereunder. The population of France is approximately 41,980,000. Analysis of data submitted before the Board in the *North Atlantic Route* case,[4] and incorporated in the record in this proceeding by reference, reveals that of the passengers traveling between the United States and Europe in 1937, more than 144,817, or 22 percent, were to or from France. Of the international telegraph traffic to the countries of Europe in 1937, 1,343,941 messages, or 13.5 percent of the total, were exchanged with France. In the same year 20 percent of the total radio telephone traffic from the United Sates to countries of Europe was with France. At the end of 1940, 8.2 percent of the total United States investment in the countries of Europe was in France. In view of the community of interest between the United States and France thus indicated and in the light of the reciprocal rights contemplated by the Air Transport Services agreement, we find that service by a French airline between France and the United States will be in the public interest.

As previously indicated the applicant proposes and the bilateral agreement contemplates, service between France and Boston, New York, and Washington, and the site of the United Nations Organization via intermediate points over the North Atlantic. The route which the applicant proposed to fly would include stops at Foynes, Ireland, and Gander, Newfoundland. In addition alternate routings are contemplated via Prestwick, Scotland; Reykjavik, Iceland; and Goose Bay, Labrador, and via the Azores and Bermuda. A witness for the applicant testified that the alternate routes would be followed only as required by weather conditions.

[4] *Northeast Air. et al., North Atlantic Routes*, 6 C.A.B. 319 (1945).

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We will therefore issue a permit authorizing service between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, and the coterminal points Boston, Mass., New York, N. Y., and Washington, D. C., provided that Prestwick, Scotland; Reykjavik, Iceland; Goose Bay, Labrador; the Azores, and Bermuda may be included as intermediate points if and when required by weather conditions. The permanent site of the United Nations Organization is not yet known and the permit issued herein therefore will not include authorization to operate to such a point. When a permanent location is determined consideration will be given to amendment of the permit.

A similar operating plan, except for Bermuda, is proposed for route No. 2 between France and Chicago via Montreal. We will therefore issue a permit authorizing service between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, the intermediate point Montreal, Canada, and the terminal point Chicago, Ill., subject to the same provision as to weather alternates, except Bermuda, as that applicable to route No. 1.

The applicant proposes to operate a biweekly schedule from Martinique, via points in the Caribbean area, to Port-au-Prince, Haiti, including a stop at San Juan, P. R. The record shows that Martinique is a French possession in the Caribbean area, which is inaccessible to visitors because of the lack of adequate transportation facilities. Notwithstanding this inadequacy, 10,000 visitors arrived at Martinique during 1935, of whom 90 percent were Americans. Estimates for the year 1936 place the number of visitors at 14,000, of whom 13,000 were Americans. In the past, service between Ciudad Trujillo, Dominican Republic; San Juan, and Martinique has been by irregular seaplane or an occasional freight steamer. Witnesses for the applicant estimated that its proposed service would develop a substantial traffic volume and they anticipate a full load with aircraft having a capacity for 20 to 22 passengers. In view of the factors outlined above and the provisions of the Air Transport Services Agreement, we find that service by a French airline between Martinique and Haiti, via intermediate points in Guadaloupe, Antigua, and St. Martin, the intermediate point San Juan, an intermediate point in the Dominican Republic, and a terminal point in Haiti, is required by the public interest.

The applicant is also seeking a permit authorizing service between Indochina and Manila, Philippine Islands, via points in China and Hong Kong.

Data of record disclose that in 1939, Indochinese imports from the Philippines were valued at 2,499,000 francs, while exports were valued at 75,808,000 francs. In the same year, imports from Hong Kong were 166,513,000 francs and exports were 308,216,000 francs. In 1940, the value of Philippine imports

from the French East Indies amounted to 1,162,000 pesos, while exports were 342,000 pesos. In view of the facts of record, and the provisions of the Air Transport Services Agreement, we find that the public interest will be served by a route between Indochina and the Philippine Islands, via intermediate points in China and Hong Kong, operated by a French air carrier. However, since it is anticipated that the jurisdiction of the United States to authorize air transportation to and from the Philippine Islands will cease shortly, the order with reference to the issuance of this permit, and the permit itself, shall contain appropriate clauses with reference to the termination of said permit at such time as the authority of the United States in the Philippine Islands shall have come to an end.

The permits will, by their terms, be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation to which France and the United States shall be parties now in effect or that may become effective during the period the permit remains in effect, as well as to the provisions of the Act and the orders, rules, and regulations issued thereunder and to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by us.

On the basis of the foregoing considerations and all the facts of record, we find that foreign air transportation with respect to persons, property, and mail, by an airline designated by France (1) between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, and the coterminal points Boston, Mass., New York, N. Y., and Washington, D. C., provided that Prestwick, Scotland; Reykjavik, Iceland; Goose Bay, Labrador; the Azores, and Bermuda may be included as intermediate points if and when required by weather conditions; (2) between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, the intermediate point Montreal, Canada, and the terminal point Chicago, Ill., provided that Prestwick, Reykjavik, Goose Bay, and the Azores may be included as intermediate points if and when required by weather conditions; (3) between a terminal point in Martinique, intermediate points in Guadeloupe, Antigua, and St. Martin, the intermediate point San Juan, P. R., an intermediate point in the Dominican Republic, and a terminal point in Haiti; and (4) between a terminal point in Indochina, intermediate points in China, the intermediate point The British Crown Colony of Hong Kong, and the terminal point Manila, Philippine Islands, will be in the public interest, and that Air France is an airline so designated and is fit, willing, and able properly to perform such air transportation and to conform to the provisions of the Act and to our rules, regulations, and requirements thereunder; and that foreign air carrier permits should be issued authorizing Air France, upon the terms hereinabove stated, to engage in such air transportation.

BEST COPY AVAILABLE

An appropriate order will be entered.

Ryan, Vice Chairman, Lee and Young, Members of the Board, concurred in the above opinion. Pogue, Chairman, and Branch, Member, did not take part in the decision.

ORDER

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof, and finding that its action in this matter is necessary pursuant to the said opinion, and a motion having been filed by Air France for severance for further proceedings of that portion of its application which requests a permit to operate beyond New York to Mexico, and it appearing that all parties have consented to the granting of such severance,

IT IS ORDERED, 1. That permits be issued to Air France authorizing it to engage in foreign air transportation with respect to persons, property, and mail as follows: (a) between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, and the coterminal points Boston, Mass., New York, N. Y., and Washington, D. C.; *provided*, that Prestwick, Scotland; Reykjavik, Iceland; Goose Bay, Labrador; the Azores, and Bermuda may be included as intermediate points if and when required by weather conditions; (b) between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, the intermediate point Montreal, Canada, and the terminal point, Chicago, Ill.; *provided*, that Prestwick, Reykjavik, Goose Bay, and the Azores may be included as intermediate points if and when required by weather conditions; (c) between a terminal point in Martinique, intermediate points in Guadeloupe, Antigua, and St. Martin, the intermediate point San Juan, P. R., an intermediate point in the Dominican Republic, and a terminal point in Haiti; and (d) between a terminal point in Indochina, intermediate points in China, the intermediate point The British Crown Colony of Hong Kong, and the terminal point Manila, Philippine Islands.

2. Said permits, unless terminated at an earlier date pursuant to the terms of said permits or of the Bilateral Air Transport Agreement between the Government of the United States and the Provisional Government of the French Republic, effective March 27, 1946, shall terminate (a) at the termination or expiration of the said Agreement; (b) upon the effective date of any amendment to said Agreement which shall have the effect of eliminating any route or routes herein authorized from the routes which may be operated by airlines designated by the French Republic; or (c) upon such date as any permit or permits granted by the Board to some other carrier designated by the French Republic pursu-

ant to the said Agreement, in lieu of the holder thereof, shall become effective. The said permit authorizing foreign air transportation to and from Manila, P. I., shall terminate on July 4, 1946, or at such time as the United States shall no longer have jurisdiction to authorize air transportation to and from the Philippine Islands;

3. That the exercise of the privileges granted by the permits to be issued shall be subject to the terms, conditions, and limitations prescribed by section 238.4 of the Board's Economic Regulations, all amendments thereto, and such other terms, conditions, and limitations as may from time to time be prescribed by the Board, and the holder hereof shall conform to all other applicable regulations and statutes in force in the United States;

4. That said permits shall be issued in the form attached hereto and shall be signed on behalf of the Board by the Chairman of the Board and shall have affixed thereto the seal of the Board, attested by the Secretary. Said permits shall be effective from the date of their approval by the President of the United States.

5. That the portion of the application herein which is designated "route No. 3" and applies for a foreign air carrier permit to operate from "France via intermediate points over the North Atlantic to New York and beyond to Mexico, in both directions", is hereby severed for further proceedings.

6. That the application in this proceeding, except to the extent to which it is severed for further proceedings or granted in this decision or by this order, be and it is denied.

The White House, June 11, 1946 — Approved:

[S] HARRY S. TRUMAN

FOREIGN AIR CARRIER PERMITS

AIR FRANCE

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, and the coterminal points Boston, Mass., New York, N. Y., and Washington, D. C.; *provided*, that Prestwick, Scotland; Reykjavik, Iceland; Goose Bay, Labrador; the Azores, and Bermuda may be included as intermediate points if and when required by weather conditions.

The holder hereof shall conform with the airworthiness requirements prescribed by the competent aeronautical authorities of the Government of the French Republic for aircraft employed in comparable French air transport services.

This permit shall be subject to all the applicable provisions of any treaty, convention, or agreement affecting international air transportation to which the French Republic and the United States shall be parties now in effect or that may become effective during the period in which this permit remains in effect.

The exercise of the privileges granted by this permit shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be effective from the date of its approval by the President of the United States. Unless terminated at an earlier date pursuant to the terms hereof or of the Bilateral Air Transport Agreement between the United States and the French Republic, effective March 27, 1946, this permit shall terminate (1) at the termination or expiration of said Agreement; (2) upon the effective date of any amendment to said Agreement which shall have the effect of eliminating the route herein authorized from the routes which may be operated by airlines designated by the French Republic; or (3) upon such date as any permit granted by the Board to some other carrier designated by the French Republic pursuant to said Agreement, in lieu of the holder hereof, shall become effective.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, this 7th day of June 1946.

The White House, June 11, 1946 — Approved:

[S] HARRY S. TRUMAN

AIR FRANCE

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, between a terminal point in France, an intermediate point in Eire, an intermediate point in Newfoundland, the intermediate point Montreal, Canada, and the terminal point, Chicago, Ill.; *provided*, that Prestwick, Scotland, Reykjavik, Iceland; Goose Bay, Labrador; and the Azores may be included as intermediate points if and when required by weather conditions.

The holder hereof shall conform with the airworthiness requirements prescribed by the competent aeronautical authorities of the Government of the French Republic for aircraft employed in comparable French air transport services.

This permit shall be subject to all the applicable provisions of

any treaty, convention, or agreement affecting international air transportation to which the French Republic and the United States shall be parties now in effect or that may become effective during the period in which this permit remains in effect.

The exercise of the privileges granted by this permit shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

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IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, this 7th day of June 1946.

The White House, June 11, 1946 — Approved:

[S] HARRY S. TRUMAN

AIR FRANCE

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, between a terminal point in Martinique, intermediate points in Guadeloupe, Antigua, and St. Martin, the intermediate point San Juan, P. R., an intermediate point in the Dominican Republic, and a terminal point in Haiti.

The holder hereof shall conform with the airworthiness requirements prescribed by the competent aeronautical authorities of the Government of the French Republic for aircraft employed in comparable French air transport services.

This permit shall be subject to all the applicable provisions of any treaty, convention, or agreement affecting international air transportation to which the French Republic and the United States shall be parties now in effect or that may become effective during the period in which this permit remains in effect.

The exercise of the privileges granted by this permit shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be effective from the date of its approval by the President of the United States. Unless terminated at an earlier date pursuant to the terms hereof or of the Bilateral Air Transport Agreement between the United States and the French Republic, effective March 27, 1946, this permit shall terminate (1) at the termination or expiration of said Agreement; (2) upon the effective date of any amendment to said Agreement which shall have the effect of eliminating the route herein authorized from the routes which may be operated by airlines designated by the French Republic; or (3) upon such date as any permit granted by the Board to some other carrier designated by the French Republic pursuant to the said Agreement, in lieu of the holder hereof, shall become effective.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, this 7th day of June 1946.

The White House, June 11, 1946 — Approved:

[S] HARRY S. TRUMAN

AIR FRANCE

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in foreign air transportation with respect to persons, property, and mail, between a terminal point in Indochina, intermediate points in China, the intermediate point The British Crown Colony of Hong Kong, and the terminal point Manila, Philippine Islands.

The holder hereof shall conform with the airworthiness requirements prescribed by the competent aeronautical authorities of the Government of the French Republic for aircraft employed in comparable French air transport services.

This permit shall be subject to all the applicable provisions of any treaty, convention, or agreement affecting international air transportation to which the French Republic and the United States shall be parties now in effect or that may become effective during the period in which this permit remains in effect.

The exercise of the privileges granted by this permit shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

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This permit shall be effective from the date of its approval by the President of the United States. Unless terminated at an earlier date pursuant to the terms hereof or of the Bilateral Air Transport Agreement between the United States and the French Republic, effective March 27, 1946, this permit shall terminate (1) at the termination or expiration of said Agreement; (2) upon the effective date of any amendment to said Agreement which shall have the effect of eliminating the route herein authorized from the routes which may be operated by airlines designated by the French Republic; or (3) upon such date as any permit granted by the Board to some other carrier designated by the French Republic pursuant to the said Agreement, in lieu of the holder hereof, shall become effective. This permit shall terminate on July 4, 1946, or at such time as the United States shall no longer have jurisdiction to authorize air transportation to and from the Philippine Islands.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this permit to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, this 7th day of June 1946.

The White House, June 11, 1946 — Approved:

[S] HARRY S. TRUMAN

☆ U. S. GOVERNMENT PRINTING OFFICE: 1946—699805

AIRWAYS (ATLANTIC) LIMITED-- PERMIT TO FOREIGN AIR CARRIER, 2 C.A.B. 181 (1940
Pg. 396-404

DOCKET No. 401

AIRWAYS (ATLANTIC) LIMITED.—PERMIT TO FOREIGN AIR CARRIER

In the matter of the application of British Overseas Airways Corporation, under section 402 (h) of the Civil Aeronautics Act of 1938, for the transfer to Airways (Atlantic) Limited of the permit heretofore issued to Imperial Airways Limited to engage in foreign air transportation between the United States and the United Kingdom.

Decided July 29, 1940

Application of British Overseas Airways Corporation, under section 402 (h) of the Civil Aeronautics Act of 1938, for the transfer to Airways (Atlantic) Limited of the permit authorizing Imperial Airways Limited to engage in foreign air transportation with respect to persons, property, foreign mail and United States and foreign-transit mail (to the extent to which the Postmaster General shall, from time to time, tender such United States and foreign-transit mail to said Imperial Airways Limited) between a terminal point in the United States and a terminal point in the United Kingdom of Great Britain and Northern Ireland, via Canada, Newfoundland and Ireland or via Bermuda, for a period of fifteen years from the first day of June 1936, granted.

OPINION

BY THE BOARD:

British Overseas Airways Corporation (hereinafter referred to as "applicant"), a Public Corporation organized and existing under and pursuant to an Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland, entitled "British Overseas Airways Act, 1939 (2 & 3 Geo. VI, Ch. 61)," by application filed April 11, 1940, as amended by Amendment No. 1 to said application filed April 20, 1940, seeks the transfer under section 402 (h) of the Civil Aeronautics Act of 1938 of the foreign air carrier permit heretofore issued to Imperial Airways Limited (Docket No. 147, Order Serial No. 129) on August 4, 1939, authorizing it to engage in scheduled foreign air transportation for the carriage of persons, property, foreign mail and United States and foreign-transit mail (to the extent to which the

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Postmaster General shall from time to time tender such United States and foreign-transit mail to said Imperial Airways Limited) in trans-Atlantic air service between a terminal point in the United States and a terminal point in the United Kingdom, via Canada, Newfoundland and Ireland, or via Bermuda, for a period of fifteen years from the first day of June, 1936, to Airways (Atlantic) Limited, a company controlled by applicant. Accompanying said application is the verified consent of Imperial Airways Limited to the transfer as requested.

Section 402 (h) of the Act provides that no permit issued by the Board authorizing a foreign air carrier to engage in foreign air transportation shall be transferred unless such transfer is approved by the Board as being in the public interest. There is no statutory requirement that applications for such transfers shall be the subject of a public hearing, but in the instant case, both applicant and Imperial Airways Limited specifically waived notice and public hearing. Inasmuch as the application and affidavit in support thereof are complete, we have not deemed it necessary to call witnesses in order to adduce further evidence on the matter before us.

On April 17, 1937, the Secretary of Commerce of the United States of America, pursuant to the provisions of an exchange-of-notes agreement entered into between the Governments of the United States and of the United Kingdom of Great Britain and Northern Ireland, the Dominion of Canada and Ireland, providing for the conduct of a reciprocal civil air transport service between the United States and the United Kingdom, on a frequency of two round trips per week operated respectively by an American and a British air carrier, issued to Imperial Airways Limited, or a company in which Imperial Airways Limited holds a controlling interest, a permit valid for a period of fifteen years from the first day of June 1936 upon the following conditions:

(a) That the number of round trips by Imperial Airways shall not exceed two per week, unless additional frequencies are authorized by the United States Government.

(b) That the service terminates in the United States at a port of entry serving New York and used by a United States airline company as the terminal for a reciprocal transatlantic service.

(c) That Imperial Airways conforms to all air navigation regulations laid down by the above United States port of call or by United States authority, and conforms to all applicable regulations and statutes in force in the United States.

(d) That Imperial Airways conforms with the airworthiness and airman competency requirements laid down by the Government of the United Kingdom for a British international air service.

(e) That a United States airline company is authorized concurrently by the Government of the United Kingdom, and to the extent necessary by the other British authorities concerned, for a period of fifteen years, to conduct a similar

reciprocal civil air transport service of a frequency not exceeding two round trips per week, under similar conditions, between the United States and the United Kingdom, via Newfoundland or via Bermuda and other countries, including the right to carry passengers, goods, and mail between any of the above territories.

(f) That if the above reciprocal privileges to be accorded to the United States airline company lapse, the privileges granted to Imperial Airways by the Government of the United States will lapse simultaneously.

(g) That notwithstanding that this permit is valid for a period of fifteen years from the first day of June 1936, the privileges afforded herein to Imperial Airways shall not be available unless and until the United States airline company shall operate its reciprocal scheduled transatlantic service.

(h) That this permit may be withdrawn upon notice for important reasons of public policy when the conditions thereof or the actual practice thereunder is no longer regarded by the Government of the United States as being in its interest. Such notice shall be sent to Imperial Airways only after consultation between the two Governments concerned for a period of at least sixty days. Withdrawal will take effect two years after such notice has been sent.

(i) That Imperial Airways shall keep on file with the Secretary of Commerce the name and address of its principal place of business located in the United States and the name and address of the official of said company to whom any official or legal notices in connection with the conduct or withdrawal of said transatlantic service may be sent, with the understanding that such notices will be binding upon the said Imperial Airways, as though the same had been sent to the home office of said company.

(j) That this permit is issued pursuant to exchanges of notes between the Government of the United States and the Government of the United Kingdom relative to a transatlantic air transport service, and a local United States-Bermuda service.

As a result of the enactment of the Civil Aeronautics Act of 1938, Imperial Airways Limited, by application duly filed with the Authority (Docket No. 147) sought the issuance to it, pursuant to the provisions of section 402 (c) of said Act, of a so-called "grandfather" air carrier permit, authorizing it to engage in foreign air transportation between the United States and the United Kingdom, in lieu of the permit issued by the Secretary of Commerce for such service. Under date of August 1939, after notice and public hearing, we caused to be issued to Imperial Airways Limited a foreign air carrier permit authorizing it to engage in trans-Atlantic air transportation service. Said permit sought to preserve to Imperial Airways Limited, or a company in which Imperial Airways Limited held a controlling interest, all the rights and privileges conferred by the permit of April 17, 1937, issued by the Secretary of Commerce, and containing among others the following provision:

"The rights and privileges conferred by this permit may be exercised by Imperial Airways Limited, or by a company in which Imperial Airways Limited has a controlling interest, on the condition that, if the rights and privileges are so exercised by such controlled company, such controlled company will be bound by the provisions of this permit, the provisions of the Civil Aeronautics

Act of 1938, of the orders, rules and regulations issued thereunder, to the ... extent as if said controlled company had been specifically named herein. ... case the rights and privileges conferred by this permit shall be exercised by ... company in which Imperial Airways Limited holds a controlling inte... Imperial Airways Limited shall forthwith give written notice thereof to t... Authority."

Accordingly, Imperial Airways Limited filed written notice with t... Authority, designating Imperial Airways (Atlantic) Limited, a co... trolled company of Imperial Airways Limited, as the operating tra... Atlantic company. On August 5, 1939, said controlled compa... inaugurated scheduled trans-Atlantic service between the United Sta... and the United Kingdom and continued to operate such servi... throughout the months of August and September 1939 discontinui... its operations on September 29, 1939. To date, the British compa... has not resumed its trans-Atlantic air service.

On the same day that we issued the aforesaid permit to Imperi... Airways Limited, namely, August 4, 1939, the Parliament of the Uni... Kingdom of Great Britain and Northern Ireland enacted and Roy... Assent was given to the British Overseas Airways Act, 1939, as Ch... of St. 2 & 3 Geo. VI. This statute was enacted for the purpose o... creating British Overseas Airways Corporation and charged su... corporation with securing "the fullest development, consistent wi... economy, of efficient overseas air transport services to be operated b... the Corporation," known as British Overseas Airways Corporatio... and provided for the acquisition by the Corporation of all the unde... takings and assets of Imperial Airways Limited and, with certai... exceptions, all the undertakings and assets of British Airways Limite... and after such acquisition for the operation by the Corporation of a... the air transport services theretofore conducted by Imperial Airwa... Limited and British Airways Limited. The Corporation was to co... sist of a chairman, deputy-chairman and such number of other me... bers, not less than nine nor more than fifteen, as the Secretary of Sta... for Air should determine, and should come into being and should b... deemed to have been established when the chairman and deputy... chairman and five other members were appointed. However, und... the provisions of the Chartered and Other Bodies (Temporary Pro... visions) Act, 1939 (2 & 3 Geo. VI, Chap. 119) and by an Order i... Council, dated November 17, 1939 (S. R. & O. No. 1565), the minimu... number of members of the Corporation was reduced to a chairma... deputy-chairman and one other member, or such number of oth... members, not greater than three, as the Secretary of State for Air... might from time to time direct. It appears from the petition fo... transfer and the affidavit in support thereof that the Corporation wa... established on November 25, 1939.

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The British Overseas Airways Act empowers the Corporation to operate internal air-transport services and charter flights; to undertake survey flights; to train personnel; to repair and acquire aircraft, their equipment and accessories; to acquire or construct airdromes, buildings, repair shops, air navigation facilities and miscellaneous equipment; to sell, lease or otherwise dispose of property not required for the proper discharge of the Corporation's functions; to enter into arrangements for the establishment or maintenance of air-transport services to be operated in collaboration with the Corporation or otherwise by other persons; to act as agents for any other company engaged in air transportation; to provide accommodations for passengers and facilities for the transportation of passengers and their baggage to or from airdromes; to acquire any company engaged in air transportation or in other activities of a kind which the Corporation has the power to carry on; to acquire or hold stock or other financial interest in any such company; to lend money to or guarantee the obligations of any such company; and to carry on experimental and research work in connection with the discharge of any of its functions. It further provides that the Corporation shall adopt and ratify, with such modifications as may be agreed upon by the parties concerned and approved by the Secretary of State for Air, two provisional contracts set forth in detail in the Third Schedule of the Act. These contracts are dated June 1, 1939, and provide for the sale and purchase between, on the one hand, Imperial Airways Limited or British Airways Limited, respectively, as vendors, and the Solicitor of Foreign Affairs of His Majesty's Treasury, both for himself and as Trustee for the Corporation, as purchaser, on the other, of the undertakings and assets of the respective vendors, subject to all debts and liabilities of the respective vendors outstanding on the "appointed day," the sale to be consummated on the "appointed day." The "appointed day" is defined as "such day as the Secretary of State (for Air) may by order appoint as the day upon which the undertakings of the existing companies are to be transferred to the Corporation." The record indicates that April 1, 1940, was designated as the "appointed day" and that as of such date all of the undertakings and assets of Imperial Airways Limited were transferred to and vested in British Overseas Airways Corporation, without further assurance, the transfer to be effected extending, subject to the terms of the purchase agreement and the provisions of the Act, to the whole of the undertaking of Imperial Airways Limited, including all aircraft, lands, works and other property, assets, powers, rights and privileges held or enjoyed in connection therewith or appertaining thereto, rights or interests of said company in any other undertaking and all liabilities and obligations of the existing company. Since April

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1, therefore, Imperial Airways Limited has been a corporation in process of liquidation, exercising no corporate powers except those incident to such liquidation, and applicant has succeeded to all of its rights, privilege and obligations and has been operating all of the air transportation services theretofore operated by Imperial Airways Limited or any of the companies controlled by Imperial Airways Limited.

Imperial Airways (Atlantic) Limited was a wholly-owned subsidiary of Imperial Airways Limited, and, with the transfer of the assets of Imperial Airways Limited to applicant on April 1, 1940, became a company controlled by the new Corporation. A subsidiary company is defined by the British Act as "any company more than one-half of the issued share capital whereof is held directly or through a nominee of the Corporation and any company in relation thereto in which the Corporation have a power directly or indirectly to appoint the majority of the directors." Applicant's original application requested that the trans-Atlantic permit issued to Imperial Airways Limited be transferred directly to Imperial Airways (Atlantic) Limited, as a subsidiary of the new Corporation, without prejudice to a future application for a further transfer of said permit to any other company controlled by applicant. Amendment No. 1 to said application states that on or about April 15, 1940, the corporate name of Imperial Airways (Atlantic) Limited was changed to Airways (Atlantic) Limited, and requests that the permit be issued in the amended name of the subsidiary.

An examination of the exchange-of-notes agreement entered into between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland, the Dominion of Canada and Ireland, reveals that the arrangement between the respective Governments provided for the issuance by the Government of the United States to "Imperial Airways Limited, or a company in which Imperial Airways Limited holds a controlling interest * * * of a permit to fly into, through and away from the United States, via Canada, Newfoundland and the Irish Free State or via Bermuda, for the purpose of conducting a civil air transport service between the United States and the United Kingdom for the carriage of passengers, goods and mail * * *" upon the condition "that a United States airline company is authorized concurrently by the Government of the United Kingdom and to the extent necessary by the other British authorities concerned * * * to conduct a similar reciprocal civil air transport service * * * between the United States and the United Kingdom, via Newfoundland or Bermuda and other countries, including the right to carry passengers, goods and mail between any of the above territories."

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While it might be urged that the rights and privileges conferred by any permit issued by the United States under the terms of said agreement should be exercised only by Imperial Airways Limited or a company in which Imperial Airways Limited holds a controlling interest, we believe that to place such a construction upon the agreement is to do violence to the intent and understanding of the parties signatory thereto. Clearly, it was intended that there should be a trans-Alantic service operated reciprocally by a British and by an United States air carrier, which air carriers should be acceptable to their respective governments. In fact, the exchange of notes reveals that the rights to be exercised thereunder should be on a nonexclusive basis and that the air transport companies operating the services concerned should at all times have the approval of their respective governments. The British Overseas Airways Act, 1939, created a Public Corporation, controlled and supported by the British Government, to be the successor-in-interest to the assets and undertakings of Imperial Airways Limited. It therefore follows that by operation of law, subject to the approval of such transfer by the Civil Aeronautics Board as being in the public interest, the rights and privileges conferred by the permit issued to Imperial Airways Limited for a trans-Atlantic air transportation service would pass to applicant.

Section 1102 of the Civil Aeronautics Act of 1938 provides in part as follows: "In exercising and performing its powers and duties under this Act, the Authority shall do so consistently with any obligation assumed by the United States in any treaty, convention or agreement that may be in force between the United States and any foreign country or foreign countries * * *." Under the terms of the exchange-of-notes agreement hereinbefore mentioned, it is contemplated that an United States air carrier shall be permitted to operate a trans-Atlantic service between the United States and the United Kingdom, and that a British air carrier shall be permitted to operate a reciprocal service over the same route, subject to the terms and conditions of such agreement and the permits issued thereunder. It cannot be doubted that the British Government has chosen to designate applicant or a company in which applicant holds a controlling interest as the successor to Imperial Airways Limited or a company in which Imperial Airways Limited holds a controlling interest. We find, therefore, that the approval of the transfer of the permit held by Imperial Airways Limited authorizing it to engage in air transportation between the United Kingdom and the United States is consistent with the terms of the exchange-of-notes agreement entered into between the Government of the United States and the Governments of Great Britain and Northern Ireland, the Dominion of Canada and Ireland, and is in the public interest.

The application, as amended, requests the transfer of the permit to Airways (Atlantic) Limited. The amended application reveals that Airways (Atlantic) Limited is that corporation formerly known as Imperial Airways (Atlantic) Limited. Imperial Airways (Atlantic) Limited was a wholly-owned subsidiary of Imperial Airways Limited, and on the "appointed day" the outstanding stock of the subsidiary company was transferred by Imperial Airways Limited as one of the assets and undertakings to British Overseas Airways Corporation. Hence, Airways (Atlantic) Limited is a wholly-owned subsidiary of applicant. Since the amended application requests that the permit be issued directly to Airways (Atlantic) Limited, which is stated to be the operating company presently designated to conduct trans-Atlantic service, we see no occasion to include in the permit to be issued to Airways (Atlantic) Limited a provision to the effect that the rights and privileges conferred by the permit may be exercised by said company or any other company in which British Overseas Airways Corporation holds a controlling interest. The decision upon this issue is, of course, without prejudice to an application which may be filed in the future for a further transfer of the permit to any other company controlled by applicant. We make specific reference to this aspect of the transfer for the reason that it is indicated in the application that at the time the inter-governmental agreement for trans-Atlantic service was negotiated it was contemplated by the British Government that at some time in the future the British trans-Atlantic service would be operated by a joint operating company to be controlled by Imperial Airways Limited through the ownership of 51 percent of stock, the remaining 49 percent to be owned in equal parts by a Canadian company to be nominated by the Government of the Dominion of Canada and an Irish company to be nominated by the Government of Ireland, each nominating three of the nine directors constituting the Board.

We conclude, therefore, that it is in the public interest to transfer the permit for trans-Atlantic service now held by Imperial Airways Limited to Airways (Atlantic) Limited, without prejudice, however, to the filing by Airways (Atlantic) Limited, or its parent company, British Overseas Airways Corporation, of a future application for a further transfer of said permit to any other company controlled by applicant as being in the public interest.

An appropriate order will be entered.

Warner, Vice Chairman, Ryan and Mason, Members of the Board concurred in the above opinion. Branch, Chairman, did not take part in the decision.

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ORDER

British Overseas Airways Corporation having filed application under section 401 (h) of the Civil Aeronautics Act of 1938 for the transfer to Airways (Atlantic) Limited, one of its subsidiaries, of the permit authorizing Imperial Airways Limited to engage in foreign air transportation with respect to persons, property, foreign mail, and United States and foreign-transit mail (to the extent to which the Postmaster General shall from time to time tender such United States and foreign-transit mail to said Imperial Airways Limited) between a terminal point in the United States and a terminal point in the United Kingdom of Great Britain and Northern Ireland, via Canada, Newfoundland and Ireland, or via Bermuda, for a period of fifteen years from the first day of June 1936; and a public hearing thereon having been waived by British Overseas Airways Corporation and Imperial Airways Limited, the present holder of said permit; and Imperial Airways Limited having filed its consent to the transfer of said permit to said Airways (Atlantic) Limited; and the Board, upon consideration of the application as amended and the verified affidavit in support thereof, having issued its opinion containing its findings, conclusions and decision, which opinion is attached hereto and made a part hereof, and finding that its action in this matter is necessary pursuant to said opinion:

IT IS ORDERED, That the transfer of the permit heretofore issued to Imperial Airways Limited on August 4, 1939 (Docket No. 147; Order, Serial No. 129) authorizing it to engage in foreign air transportation with respect to persons and property, foreign mail and United States and foreign-transit mail (to the extent to which the Postmaster General shall from time to time tender such United States and foreign-transit mail to said Imperial Airways Limited) between a terminal point in the United States and a terminal point in the United Kingdom of Great Britain and Northern Ireland, via Canada, Newfoundland and Ireland, or via Bermuda, for a period of fifteen years from the first day of June 1936, be approved, without prejudice, however, to the filing by Airways (Atlantic) Limited or its parent company, British Overseas Airways Corporation, of a future application for a further transfer of said permit to any other company controlled by British Overseas Airways Corporation, as being in the public interest.

IT IS FURTHER ORDERED, That a new permit shall be issued to Airways (Atlantic) Limited, in the form attached hereto and shall be signed by Edward Warner, Oswald Ryan and G. Grant Mason, Jr., acting in their capacity as the Civil Aeronautics Board, and shall have affixed thereto the seal of the Board, attested to by the Secretary of the Board. Said permit shall be made effective from the 20th day of July 1940 and upon the issuance thereof the permit heretofore issued to Imperial Airways Limited by the Civil Aeronautics Authority on August 4, 1939, shall be canceled.

The White House, August 16, 1940—Approved:

(S) FRANKLIN D. ROOSEVELT.

2 C. A. B.

LETTER FROM SECRETARY OF STATE HENRY A. KISSINGER DATED OCTOBER 6, 1975 TO HON. WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION - Pg. 405-406

October 6, 1975

Dear Bill:

I am happy to respond to your request for my views on the foreign policy considerations to be taken into account in your decision regarding the applications by Air France and British Airways to operate the supersonic Concorde aircraft to Kennedy and Dulles airports.

We have until now addressed ourselves only to the procedural aspects of entry of the Concorde into the United States. In my letter to Chairman McClellan last July 22, I pointed out that the British and French Governments had on several occasions expressed to us their concern about possible discriminatory treatment of the Concorde, and that we had assured them at the highest levels that the Concorde would be treated fairly in all aspects of U.S. Government regulation. We were pleased that the Congress agreed to allow the decision with regard to Concorde entry to be taken in accordance with the established administrative procedures and not to take specific legislative action against such entry.

The British and French authorities are fully mindful of the considerations involved in any decision on their applications, in view of the extensive public hearings and Congressional debates on the environmental aspects of the aircraft. In terms of our political relations, we realize that this project, in which both governments have invested very large sums, represents a unique achievement by both Britain and France in a high technology aircraft that commands close attention at the highest levels in both countries, as well as intense public and governmental interest in view of the financial stake and national prestige involved in placing the Concorde into commercial service, and especially into transatlantic service.

The Honorable
William T. Coleman, Jr.
Secretary of Transportation

Under these circumstances, it is apparent that any Administration decision that would amount to an outright rejection of the applications of the two airlines for the limited service they intend to begin next year would be viewed as a serious blow by two of our closest friends and allies, whose interests coincide with our own in so many areas. The impact would be particularly severe in the case of France in light of the immense disappointment the French felt earlier this year in losing the international competition to the United States in providing a new military aircraft as the replacement for the F-104 fighter aircraft in the hands of certain other NATO countries. We could expect strong public and official resentment against the United States if we were to reach a decision that they would view as not in harmony with the generally excellent relations we now enjoy with both countries on a broad spectrum of important matters. It has been suggested that there would be pressures in one or both countries to respond to such a decision with some form of retaliatory action. Although the immediate practical possibilities in this respect would appear to be limited, protectionist elements would be strengthened, with consequent adverse effects. In any case, in view of our close and mutually advantageous relations with both of these countries, we should take due account of the impact of any decision on their interests.

I hope that in taking the Administration's initial decision with specific regard to the Concorde, you will find it possible to weigh carefully the concerns of these two close allies, together with the environmental and other criteria that you must consider.

Best regards,

/s/

Henry A. Kissinger

OPINION OF THE DEPARTMENT OF TRANSPORTATION AND FEDERAL AVIATION ADMINISTRATION SUBMITTED TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS RE: IN THE MATTER OF SENATE BILL NO. 1161 (AS AMENDED) PENDING BEFORE THE HOUSE OF REPRESENTATIBES OF THE COMMONWEALTH OF MASSACHUSETTS, UNDATED. Pg. 407-417

SUPREME JUDICIAL COURT
COMMONWEALTH OF MASSACHUSETTS

In the Matter of Senate Bill No. 1161 (as amended) Pending Before the House of Representatives of the Commonwealth of Massachusetts

OPINION OF
THE DEPARTMENT OF TRANSPORTATION
AND
THE FEDERAL AVIATION ADMINISTRATION

Pursuant to leave of the Court, the General Counsel of the Department of Transportation and the General Counsel of the Federal Aviation Administration submit the following legal opinion.

The House of Representatives of the Commonwealth of Massachusetts by Order No. 5382 dated 20 April 1971 has requested the opinion of the Honorable Justices of this Court upon the question of the constitutionality of Senate Bill No. 1161 (amended) if enacted into law.

The Journal of the House for Tuesday, 20 April 1971, contains the amended language of Senate Bill 1161, "An Act prohibiting supersonic transport planes from landing or taking off in the Commonwealth," which reads:

> "Notwithstanding the provision of any law, unless there is an emergency, no commercial supersonic transport plane which is not capable of limiting its noise level to one hundred and eight decibels or less while landing, on the ground, or taking off, will be permitted to land or take off in the commonwealth."

The Court by Announcement dated 30 April 1971 invited the filing of briefs by interested persons.

This opinion urges this Court to find in its Advisory Opinion concerning the question of law presented by the House of Representatives that the Commonwealth of Massachusetts is not constitutionally competent to enact any law which regulates or prohibits the operation of supersonic aircraft at airports within the Commonwealth of Massachusetts, for the reasons that the Federal Government has preempted the regulation of airspace and aircraft operations, and because the Commerce Clause of the United States Constitution requires that air commerce be regulated by a single authority, the Congress of the United States.

I. THE FEDERAL GOVERNMENT HAS SO PREEMPTED THE REGULATION OF AIRSPACE AND AIRCRAFT OPERATIONS AS TO PRECLUDE ENFORCEMENT OF SENATE BILL NO. 1161.

A. The Federal Scheme is Comprehensive and Pervasive.

Through a series of enactments and regulations, the federal government has asserted a broad authority to control and regulate use of the navigable airspace and aircraft operations. The principal statute is the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542, as amended.

1. The Federal Aviation Act of 1958. Under this Act, the United States is declared "to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." (49 U.S.C. § 1508(a)) Each citizen of the United States is granted the "right of freedom of transit through the navigable airspace of the United States." (49 U.S.C. § 1304) "Navigable airspace" is defined in the Act as all airspace "above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." (49 U.S.C. § 1301 (24))

To facilitate transit through the air in a safe and efficient manner, the Act established the Federal Aviation Administration (FAA), headed by an Administrator, and conferred upon that agency broad powers to regulate air commerce in the "public interest." (49 U.S.C. §§ 1303, 1341(a), 1348) Matters enumerated by the Act as being part of the "public interest," include "the regulation of air commerce . . . to best promote its development and safety and fulfill the requirements of national defense"; "the control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of safety and efficiency"; "the development and operation of a common system of air traffic control and navigation for both military and civil aircraft." (49 U.S.C. § 1303)

In order to fulfill the broad mandate of the Act, the Act confers upon the Administrator of the FAA equally broad powers over all aspects of the navigation of aircraft. Thus the Administrator is authorized, among other things, to develop plans and formulate policy with respect to the use of navigable airspace and allot the use of such airspace as he deems proper (49 U.S.C. § 1348 (a)); prescribe

rules governing the flight of aircraft, including rules for the efficient and safe use of navigable airspace as well as "for the protection of persons and property on the ground." (49 U.S.C. § 1348(c)); promote air commerce by establishing and maintaining air navigation facilities (49 U.S.C. § 1303(d), 1348(b)); conduct tests and undertake research and development of aircraft and aircraft equipment (49 U.S.C. § 1353(b)); and prescribe certain types of equipment aircraft must utilize (49 U.S.C. § 1423(a) (1)).[1] In addition to these express enumerated powers, the Administrator is given the authority generally to issue such orders, rules and regulations as he deems necessary to execute his duties and carry out the provisions of the Act. (49 U.S.C. § 1354(a))

2. The 1968 Amendment. Among the most important amendments to the Federal Aviation Act is that added by Public Law 90-411, 82 Stat. 395 (1968) pertaining to aircraft noise and sonic boom. (49 U.S.C. § 1431) Under the amendment, the Administrator is required to prescribe such standards, rules, and regulations as he may find necessary for the control and abatement of aircraft noise. In so doing, the Administrator must consider inter alia whether any proposed standard, rule or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest and whether it is economically reasonable and technologically practical and appropriate for the type of aircraft to which it will apply.

3. Regulations under the Act. Pursuant to his broad authority, the Administrator has issued numerous complex and detailed rules and regulations governing air navigation. See Title 14, Code of Federal Regulations, especially Parts 71, 73, 75, 77, 91, 93, 95, 97. As part of the regulatory scheme established by the FAA to assure the orderly flow of air traffic, the Administrator has divided the navigable airspace above the United States into various "control areas"

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1 Scheduled airlines in addition to regulation by the FAA are also subject to regulation by the Civil Aeronautics Board. (C.A.B.). Thus, before an air carrier may engage in air transportation and be subject to operational and navigation regulation by the FAA, the airline must secure a certificate from the C.A.B. permitting it to engage in air transportation. (49 U.S.C. § 1371)

and "control zones." (14 C.F.R. 1.1, 71.7, 71.11) Each of the designated control areas and zones has been assigned a different use. For example, the airspace from the surface up to 2,000 feet above the surface within a horizontal radius of five statute miles from the geographical center of any airport having a control tower, is designated "airport traffic area" and is reserved exclusively for the takeoff and landing of aircraft at the airport. (14 C.F.R. 1.1, 91.85(b)) Other examples of designated airspace include "jet routes" which are located between 18,000 feet and 45,000 feet above mean sea level and "federal airways," each eight miles wide and located between 700 feet above the surface of the earth to 18,000 feet above mean sea level (14 C.F.R. 75.1, 75.11, 71.3, 71.5.

All aircraft operating within the navigable airspace must comply with the general operating and flight rules of the FAA (14 C.F.R. 91). At airports with control towers operated by the United States, such as the Logan International Airport at Boston, all operations to, from, or on the airport are regulated by the FAA in an effort to maintain traffic separation and avoid collision. Landings and departures, which are permitted only after clearance is obtained from FAA personnel, are made pursuant to procedures and regulations of the FAA which prescribe in detail such items as route of the aircraft approaching or leaving the airport, its angle of flight, altitude at any given point, speed, and the runway the aircraft may use. (e.g., 14 C.F.R. 91.79; 91.85; 91.87; 91.116; 91.117; 91.119; 91.121; 97.1) Standard instrument approach procedures for airports, such as Logan International, are published as regulations by the FAA and are available to each pilot in the form of charts. (14 C.F.R. 97) Standard Instrument Departure Procedures established by the FAA for Logan International Airport are published by the Coast and Geodetic Survey and when incorporated in a departure clearance issued by the Tower must be complied with by the pilot. (14 C.F.R. 91.87(h)). Logan International Airport has a runway noise abatement system (14 C.F.R. 91.87 (g)), and procedures have been established by the Tower designed to reduce the community exposure to noise to the lowest practicable minimum. Although the Logan International noise abatement procedures are not mandatory on the part of pilots they are followed by FAA controllers in regard to the issuance of clearance to all large (over 12,500 pounds) aircraft and all turbine powered aircraft.

To assure no deviation from FAA procedures and regulations, all pilots operating within an airport traffic area are required to maintain two-way radio communications with the control tower and to comply with all clearances issued by the control tower. (14 C.F.R. 91.75(a), (b); 91.87(b), (h)) Air traffic outside of the airport traffic area is similarly regulated by the FAA to maintain proper aircraft separation, with the FAA having the authority to set route and altitude restrictions for aircraft operating between airports. (See e.g., 14 C.F.R. 71.1, 75.1, 91.79, 91.81, 91.119(a), (1.121(a), 91.123(a), (b), 95.1)

Although as a general rule a pilot must follow all the regulations, procedures and instructions of the FAA, the FAA recognizes that the primary responsibility and authority for the safe operation during flight time of an aircraft rests with the pilot in command. (14 C.F.R. 91.3(a), 121.533(c), 121.535(d), 121.537(d)) Accordingly, a pilot in command is expressly authorized to deviate from certain of the general operating and flight rules to the extent necessary for the safety of the operation. (14 C.F.R. 91.3(b)) This placing of primary responsibility for safe operation upon the pilot in command is consistent with the long standing practice in aviation for the safety of its operation and in recognition of the fact that final decisions must be made whenever possible by the pilot.

The Administrator has promulgated aircraft type certification regulations in accordance with his responsibilities in the field of noise control and abatement. (14 C.F.R. 21, 36, 34 F.R. 18355-18379) and under the authority of Public Law 90-411, supra. On 10 April 1970, the Administrator issued a Notice of Proposed Rule Making to adopt a new Federal Aviation Regulation 91.55 in regard to sonic boom by civil aircraft. (35 F.R. 6189, April 16, 1970) Under consideration at the present time are proposed regulatory actions (Advance Notice of Proposed Rule Making, 35 F.R. 16980, 4 November 1970) relating to the retrofitting of subsonic transport and turbojet powered aircraft for the purpose of reducing noise at the source. Further, FAA studies are continuing in regard to the changing of operating procedures for present day subsonic transport and turbojet powered aircraft to reduce to an absolute minimum the noise effect without retrofit.

4. National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852, approved January 1, 1970, states that it is national policy to encourage productive and enjoyable harmony between man and his environment. To this end Congress declared it is the continuing policy of the Federal Government in cooperation with State and local governments and others, to use all practicable means "to foster and promote the general welfare, to create and maintain conditions under which man and nature exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Accordingly, all agencies of the Federal Government are required under the Act to review all their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies which prohibit full compliance with the national policy expressed by Congress and to report to the President by July 1, 1971.

5. Airport and Airway Development Act of 1970. The Congress exercised further authority in the field of aviation by the enactment of Public Law 91-258, 84 Stat. 219 (May 21, 1970). Title I of that Act, the "Airport and Airway Development Act of 1970," authorizes the Secretary of Transportation to make grants of $840 million for public airport development over a four-year period (§ 14b). This Title also requires airports which serve air carriers certificated by the C.A.B. to obtain an airport operating certificate from the Administrator (§ 612). Such certificates can be issued only after a finding by the Administrator that the Airport is "properly and adequately equipped and able to conduct a safe operation." Title II of the new Act provides for new or increased taxes to be imposed on virtually all users of the airport and airway system. These taxes would be placed in an "Airport and Airways Trust Fund" to be expended under the Act for airport planning, airport development and airways facilities in accordance with a National Airport System Plan to be prepared by the Secretary of Transportation.

B. Enactment of Senate Bill 1161 would be Invalid Because It Seeks to Regulate a Field Preempted by Congress.

Congress, through the enactment of comprehensive legislation indicating an intention to "occupy . . . . the field," may "preempt" the field to the exclusion

of local regulation. Minns v. Davidowitz, 312 U.S. 52, 67; Pennsylvania v. Nelson, 350 U.S. 497, 502. The principle of preemption is fully applicable to the area of regulation of interstate commerce. See, e.g., Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767; Campbell v. Hussey, 368 U.S. 297.

The Supreme Court has advanced three tests for determining whether the federal government has preempted an area: (1) whether the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; (2) whether federal regulations "touch a field" in which the federal interest is dominant in the federal system; and (3) whether the enforcement of local enactments on the same subject may produce a result inconsistent with the objective of federal law. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230. See also Pennsylvania v. Nelson, supra, at 502-502. Each of these tests is clearly satisfied in this instance.

First, the scheme of federal regulation of air commerce is "comprehensive" and "extensive." Chicago and Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 105; Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303. The broad scope of federal regulation of the use of airspace and of air traffic is readily apparent from the statutes and regulations quoted above. The extent of this regulation is such that Congress could not have anticipated that states or cities would step in and try to exercise their own brand of regulation.

Second, the federal legislation regulates an area in which the federal interest is dominant. The Constitution, Article I, section 8, confers upon Congress the exclusive power to regulate interstate and foreign commerce. It is the federal government that is charged with responsibility of assuring the free flow of commerce by establishing uniform procedures prescribed by a single authority for the safe and efficient use of navigable airspace. See Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292; cf., Southern Pacific Co. v. Arizona, 325 U.S. 761, 766-67. Senate Bill No. 1161 purports to regulate air traffic and use of airspace and therefore has a direct impact upon interstate and foreign commerce which is the concern of the national government. Since "exclusive federal regulation in order to achieve uniformity vital to the national interest" is required, local legislation must give way to the overriding federal interest in this area with regard to air commerce. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144.

The third test of preemption is met here in that local regulation in the field in which the legislature seeks to legislate necessarily produces a result inconsistent with the objectives of federal legislation. In enacting the Federal Aviation Act, it was the intention of Congress to establish the right of every citizen to freedom of transit through the navigable airspace of the United States and to facilitate the exercise of that right by a federal regulatory scheme which promotes safe and efficient air commerce. The enactment of an ordinance or law by a local government that has the effect of prohibiting airplanes from using navigable airspace obviously is inconsistent with the objectives of federal law. Accordingly, local legislation with objectives different than those Congress has sought to achieve must yield.

The conclusion that Senate Bill No. 1161 purports to regulate an area preempted by legislation of the national government finds support in prior decisions holding that the federal government has preempted the area of regulation of air traffic and use of airspace. See American Airlines, Inc. v. City of Audubon Park, 297 F. Supp. 207 (W.D. Ky. 1968), aff'd, 407 F.2d 1307 (6th Cir. 1969); American Airlines, Inc. v. Town of Hempstead, 272 S. Supp. 226, 232-33 (E.D. N.Y. 1967), affirmed without reaching preemption issue, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812, 814-15 (2d Cir. 1956).

In its practical effect, Senate Bill No. 1161 is an attempt by the legislature to regulate air traffic and airspace. It is no less an attempt at such regulation than a local ordinance purporting to regulate the altitude of flight (as in the Audubon Park case, supra, and the Cedarhurst case, supra.) or the permissible noise levels of aircraft (as in Hempstead, 398 F.2d 369). Indeed, Senate Bill No. 1161 constitutes the ultimate regulation. By banning supersonic transport takeoffs and landings, it completely forbids a certain type of air traffic and a certain use of airspace.

Recent congressional action shows an intent to further preempt the field of regulating airspace and airports. As pointed out above, Congress in 1968, amended the Federal Aviation Act of 1958, to charge the Administrator of the FAA with responsibility for the issuance of rules necessary to provide for the control and abatement of aircraft noise. (Public Law 90-411, July 21, 1968)

In doing so Congress recognized that local governments had a continuing responsibility not affected by Public Law 90-411, to assure compatible land use through the exercise of land use planning and zoning powers as a necessary part of the total attack on aircraft noise (Senate Report No. 1353, July 1, 1968, U.S. Code Cong. and Adm. News (1968), 2474, 2484) The Report concurred in the views expressed by the then Secretary of Transportation in a letter to the committee dated June 22, 1968, that "H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." The same letter recognized that State and local agencies as airport proprietors might limit the use of their airports on a nondiscriminatory basis. Moreover, the new "Airport and Airway Development Act of 1970" (Public Law 91-258, July 1, 1970), summarized above, is even more comprehensive than the Federal Airport Act of 1946. These recent statutes should remove any doubt which may have existed as to federal preemption of regulation of air traffic or use of airspace.

In sum, Senate Bill No. 1161 cannot stand because it results in a regulation of the use of airspace and of air traffic. Since the federal government "has taken the particular subject in hand," the Commonwealth is precluded from enforcing its legislation. Charleston & W. C. Ry. v. Varnville Furniture Co., 237 U.S. 597, 604. This result follows "however commendable . . . different" the purpose of the local regulation. Napier v. Atlantic Coast Line R., 272 U.S. 605, 613.

II. SENATE BILL NO. 1161 IS INVALID BECAUSE THE COMMERCE CLAUSE REQUIRES THAT AIR COMMERCE BE REGULATED BY A SINGLE AUTHORITY.

In the foregoing section, we have demonstrated that the comprehensive nature of the federal legislation in regulating air traffic and the use of navigable airspace has preempted this field for the national government to the exclusion of local governments. We now show that even if the federal legislation did not preempt that area, Senate Bill No. 1161 would still be invalid as the Constitution itself confers upon Congress the exclusive power to regulate such commerce.

It is settled that the Commerce Clause of the Constitution affords protection from state legislation inimical to national commerce, even in the absence of congressional action. Southern Pacific Co. v. Arizona, 327 U.S. 761, 769. Ever since Gibbons v. Ogden, 9 Wheat 1, the states have not been deemed to have authority to . . ."regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." Id. at 767.

A local ordinance or regulation seeking to impose supersonic transport prohibition is a vivid illustration of the need to have regulation of airspace and air traffic under a single authority. Such regulation cannot be considered solely "in the accident of its particular circumstances." American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 231-232 (E.D. N.Y. 1967), for, if upheld, it would likely spread to other major airports and the inevitable result would be to hobble the supersonic aircraft as an instrument of national and world transportation.

Air transportation, perhaps more than any form of commerce, requires regulation by a single authority. Even before 600-mile per hour flights became the custom, Congress recognized this need by the establishment of the Federal Aviation Agency. It would indeed be a harmful and regressive step to permit a compromise of the FAA's authority through permitting the enforcement of local laws or regulations regarding the use of navigable airspace.

CONCLUSION

Senate Bill No. 1161, the Act now pending in the Legislature of the Commonwealth of Massachusetts, is invalid since it attempts to regulate in a field preempted by Congress and because the Commerce Clause of the Constitution requires that air commerce be regulated by a single authority, the Congress of the United States. Its effect would be to place a burden on interstate and foreign commerce, by prohibiting the operation of a certain aircraft type at at least one major interstate and international air terminal, which terminal (Logan International Airport) is a vital part of the National Airport System. A proliferation of this type of local regulation could eventually stagnate and

destroy the national air transportation system. Senate Bill No. 1161 is therefore repugnant to the Federal Aviation Act of 1958 and the Airport and Airways Development Act of 1970, and they cannot be reconciled.

Respectfully submitted:

J. THOMAS TIDD
Acting General Counsel
Department of Transportation

GEORGE U. CARNEAL
General Counsel
Federal Aviation Administration

CARL A. DANIELS
Trial Attorney
Federal Aviation Administration

STATEMENT ON BEHALF OF THE CIVIL AERONAUTICS BOARD BY ITS COUNSEL, SUBMITTED TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS RE: IN THE MATTER OF SENATE BILL NO. 1161 (AS AMENDED) PENDING BEFORE THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS, DATED MAY 18, 1971 Pg. 418-420

SUPREME JUDICIAL COURT
COMMONWEALTH OF MASSACHUSETTS

In the Matter of Senate Bill No. 1161 (as amended) Pending Before the House of Representatives of the Commonwealth of Massachusetts	)

STATEMENT ON BEHALF OF THE CIVIL AERONAUTICS BOARD
BY ITS COUNSEL

This statement is submitted pursuant to the invitation by this Court in its announcement of April 30, 1971 to the Civil Aeronautics Board to assist the Court in providing an advisory opinion concerning Senate Bill No. 1161, entitled "An Act prohibiting supersonic transport planes from landing or taking off in the Commonwealth."

The physical aspects of flight of aircraft, including matters relating to both safety and noise, are regulated by the Federal Aviation Administration pursuant to the provisions of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 et seq.) This same Act vests economic (or business) regulatory jurisdiction in the Civil Aeronautics Board with respect to flights in and out of the Commonwealth of Massachusetts to and from both domestic and foreign points, and flights within the Commonwealth which are engaged in the transportation of traffic moving to and from points outside the Commonwealth. The ability of both domestic and foreign air carriers to conduct economically sound operations is affected by any requirements governing the physical operation of their

aircraft, and, indeed, service to a given state may not be possible at all if aircraft utilized by a particular carrier are not permitted to enter the air space over the state. Consequently, the Board has a substantial, albeit an indirect, interest in the matter before the Court.

Board Counsel have read the opinion submitted to the Court by the Department of Transportation and the Federal Aviation Administration, and concur in the view that Senate Bill No. 1161, if enacted, would be a legal nullity as a matter beyond the jurisdiction of the Commonwealth. Indeed, we suggest that the disposition of this case is squarely governed by the decisions in Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871 (S.D.N.Y., 1955), aff'd, 238 F.2d 812 (C.A. 2, 1956), and American Airlines v. Town of Hempstead, 272 F. Supp. 226 (S.D.N.Y., 1967), aff'd, 398 F.2d 369 (C.A. 2, 1968), cert. denied, 393 U.S. 1017.

In Cedarhurst, it was held that a municipality could not validly control the flight paths of aircraft through enactment of an ordinance forbidding flight below a given altitude. In Hempstead, it was held that the same result could not be achieved by casting the ordinance in terms of one regulating noise. As stated by the District Court (272 F.2d Supp. at p. 230), "In a word, the Ordinance does not forbid

noise except by forbidding flights, and it is, therefore, the legal equivalent of the invalid Cedarhurst Ordinance." We submit that these cases provide the answer to the question which has been submitted to the Court. 1/

Respectfully submitted,

R. Tenney Johnson
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Civil Aeronautics Board
Washington, D.C. 20428

Robert L. Toomey
Attorney,
Civil Aeronautics Board
Washington, D.C. 20428

Dated: May 18, 1971

1/ Here, the proposed enactment by the state in terms purports to regulate the flight of aircraft, and as such, constitutes a forbidden intrusion into areas of Federal regulation and concern. In our view, an attempt to proscribe or regulate the flight of aircraft by <u>any</u> state instrumentality is equally forbidden, and this irrespective of whether it takes the form of a state law, a municipal ordinance, or a directive from the manager of an airport owned or controlled by state or municipal bodies.

CAB ORDER 76-14-21 DENYING PETITION OF ENVIRONMENTAL DEFENSE FUND, INC., FOR AMENDMENT OF FOREIGN AIR CARRIER PERMITS HELD BY BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE, TO FORBID USE OF CONCORDE SST, dated APRIL 6, 1976
Pg. 421-425

Order 76-4-21

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 6th day of April, 1976

PETITION OF ENVIRONMENTAL DEFENSE FUND, INC., FOR AMENDMENT OF FOREIGN AIR CARRIER PERMITS HELD BY BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE, TO FORBID USE OF CONCORDE SST.	Docket 28347

ORDER

On September 24, 1975, the Environmental Depense Fund (EDF) filed a petition requesting that the Board amend the foreign air carrier permits of British Airways and Air France to forbid the use of the Concorde supersonic transport. EDF argues, inter alia, that the Board must at least convene a hearing to consider the environmental/safety questions raised by Concorde. EDF contends that Concorde will deplete the stratospheric ozone shield, thereby increasing the incidence of skin cancer, cannot carry the fuel reserves required for safety on transatlantic flights, will produce intolerable noise for persons within the vicinity of airports, will waste fuel, cannot comply with emissions standards proposed in 1974 by the Environmental Protection Agency, and might be unsafe if it lost cabin pressure at its cruising altitude of 55,000 feet.

Pleadings in support of EDF's petition have been filed by Members of the House Richard L. Ottinger, Bella Abzug, Thomas T. Downey, Lester L. Wolff and James H. Scheuer; the Metropolitan Washington Coalition for Clean Air, Inc.; the Urban Environment Conference; the Anti-Concorde Project (United Kingdom); M.A.G. Consultants, Inc.; South San Francisco, California; the City of San Bruno, California; Jean R. Packard; Hewlett-Woodmere Union Free School District, Woodmere, New York; the Commonwealth of Virginia; the Sierra Club and its Potomac Chapter; the Aviation Consumer Action Project; the State of New York; the Board of Supervisors of Fairfax County, Virginia; Senators William Proxmire and John V. Tunney; and Friends of the Earth.

British Airways and Air France have filed answers in opposition to EDF's petition. The carriers contend, inter alia, that the issues raised by EDF are being fully considered by the FAA, which has the primary responsibility in the area of aviation safety, and the Secretary of Transportation; that the National Environmental Policy Act of 1969 does not require the duplicative procedures requested by EDF; and that EDF's petition must be dismissed as it requests the Board to take action which would be in conflict with our treaty obligations and with section 1102 of the Aviation Act.

EDF has filed a reply in which it argues, inter alia, that the Board is not deprived of its discretion in the instant matter by the existence of the bilateral agreements and that the FAA draft impact statement is inadequate and does not discuss the full range of alternatives open to the Board, such as the amendment of the permits in question to add fare conditions. A reply has also been filed by New York State and Air France has filed a supplementary answer.1/

By Order 75-12-71, December 16, 1975, the Board deferred consideration of EDF's petition, in view of the imminence of a decision on Concorde by the Secretary of Transportation based on his review of the FAA's final environmental impact statement of November 13, 1975.2/ On February 4, 1976, the Secretary's final decision was released. That decision gives Air France and British Airways the authority to conduct up to two Concorde flights per day into John F. Kennedy International Airport and one flight per day into Dulles International Airport for a demonstration period of 16 months, under a number of limitations, including the prohibition of flights scheduled for landing or takeoff in the U. S. before 7 a.m. or after 10 p.m. local time and of flights operating at supersonic speeds over the U. S. or any of its territories.

Upon consideration of the above pleadings and of all relevant facts, we have decided to dismiss EDF's petition.

1/ Air France accompanies its pleading with a motion for leave to file, which motion will be granted. Similar motions of EDF and New York State were granted by Order 75-12-71, December 16, 1975.

2/ The process of environmental consideration of Concorde began on March 3, 1975, when the FAA issued a draft environmental impact statement dealing with requests for amendment of their air carrier operating specifications by British Airways and Air France so as to permit operation of Concorde into JFK and Dulles Airports.

To grant EDF's request would involve the Board in a needlessly burdensome and duplicative proceeding without countervailing public benefit. The environmental and safety considerations urged by EDF have already been considered by the FAA and the Secretary of Transportation. In accordance with the National Environmental Policy Act of 1969 (NEPA), the FAA prepared a draft environmental impact statement which drew comments from a host of interested persons, agencies, and groups, including the Board, and was the subject of public hearings in Washington, D.C., New York, and Virginia. The FAA's final impact statement was prepared on the basis of those comments and hearings, as well as continuing research. In the course of his review of the FAA's findings, the Secretary of Transportation held another public hearing, providing an opportunity for interested persons and groups to again address the questions in issue. He then issued his decision of February 4, 1976, which fully sets out the bases for his conclusions. Thus, the public (as well as EDF) has had ample opportunity to present positions and articulate views in an appropriate forum on the fundamental issue of whether Concorde operations into the United States should be permitted in light of the full spectrum of environmental considerations relevant to NEPA.3/ The cumulative result of the actions of FAA and of the Secretary amply demonstrate prima facie compliance with NEPA. To conduct yet another round of proceedings to determine the same issues raised by the EDF petition would serve no useful purpose. Nor is such a redetermination required either by NEPA or the Board's responsibilities under the Federal Aviation Act. 4/

3/ EDF participated in the proceedings before the FAA and before the Secretary. Moreover, EDF has filed a petition for review of Secretary Coleman's decision in the Court of Appeals for the District of Columbia Circuit. Environmental Defense Fund v. U.S. Department of Transportation, et al., No. 76-1105. The adequacy of the Concorde Environmental Impact Statement will be determined in that litigation where the Court of Appeals has directed that all briefs be filed by April 21 and that oral argument be held soon thereafter. In any event, therefore, an attempt by this agency to retrace the environmental issues already explored would, as a practical matter, likely be overtaken by the Court's own determination regarding these very issues.

4/ As a separate matter, see also the Council on Environmental Quality guidelines on the preparation of environmental impact statements, 40 C.F.R. Part 1500, particularly section 1500.7(b), dealing with joint or "lead agency" preparation of environmental impact statements.

With respect to questions of the Concorde's safety, the statutory scheme of the Aviation Act and the Department of Transportation Act of 1966 gives primacy on matters of safety to the FAA. 5/ The FAA has made independent safety determinations of the Concorde's ability to operate in the United States' air traffic system and comply with our fuel reserve requirements 6/ and, in accepting the FAA's conclusions on safety, the Secretary of Transportation independently analyzed the facts underlying those determinations. 7/ Under these circumstances, nothing in the National Environmental Policy Act of 1969 or in the Board's own governing statute obliges the Board to consider the environmental and safety issues of Concorde de novo, and, as a matter of the sound exercises of our administrative discretion, we decline to do so. 8/

Alternatively, insofar as the EDF petition may be viewed as a complaint under Section 1002(a) of the Act, we find on this record that in view of the extensive NEPA review already taken by the FAA and by the Secretary--involving the matters urged by EDF--there is not presently a reasonable ground for investigation, and that the petition, construed as a complaint, should be dismissed.

5/ Section 611 of the Aviation Act gives the FAA responsibilities in the area of aircraft noise.

6/ The United States is bound by Article 33 of the Chicago Convention (61 Stat. 1180, T.I.A.S. No. 1591 (April 4, 1947)) and Article 4 of the bilateral agreements with France and the United Kingdom (61 Stat. 3445, T.I.A.S. No. 1679 (March 27, 1946); 60 Stat. 1499, T.I.A.S. No. 1507 (February 11, 1946) to recognize as valid the airworthiness certificates issued to Concorde by the British and French aviation authorities. Consequently, the FAA has accepted the British and French airworthiness determinations concerning such issues as range, explosive decompression, exposure to cosmic radiation and temperature shear.

7/ The fact that the Secretary of Transportation has decided to permit the Concorde to operate into the U.S. airports only on a limited basis for a demonstration period of 16 months, with any later decision to permit the continuance of flights to be governed by the data amassed and analyses undertaken on the basis of actual operations during the test period, is another factor contributing to our decision to dismiss EDF's petition. For the Board to embark upon yet another environmental review of the Concorde--where, as here, the Secretary's permission is limited to 16 months, with new data likely to emerge--would serve no practical purpose.

8/ EDF, in its reply pleading, raises the question of whether a fare condition should be imposed by the Board on Concorde operations, presumably in protection of U.S. transatlantic carriers. This economic question is echoed in New York State's pleadings. However, the International Air Transport Association's North Atlantic Traffic Conference, of which U.S. carriers are members, has now determined and submitted for Board approval new fares for North Atlantic service, including fares to be charged for the Concorde. TWA and Pan American, the two U.S. carriers which could be most affected by Concorde competition (and which, we note, have not chosen to respond to EDF's petition), and all other interested parties will have an opportunity to express their views on these fares to the Board, see Order 76-3-94. Under these circumstances, EDF has not provided us grounds for a consideration of Concorde fares in the context of its petition in the instant case.

Finally, EDF has suggested that the Board's denial of its petition without a hearing on environmental and safety issues would itself constitute a "major Federal action significantly affecting the quality of the human environment," requiring the preparation of a NEPA environmental impact statement. In the circumstances of this case, we are unable to accede to the proposition, inherent in the EDF approach, that any person seeking partial revocation of an existing airline license can trigger the full panoply of NEPA procedures merely by making the request. Indeed, considering the NEPA work which has already been done, the EDF position boils down to the assertion that anyone can create the need for a new environmental impact statement simply by requesting a second agency with a connection to the subject matter to issue another one. We do not believe that NEPA requires any such result. In the circumstances of this case, therefore, the Board is unable to find that dismissal of EDF's petition constitutes a "major Federal action siginficantly affecting the quality of the human environment" such as to warrant yet another cycle of NEPA procedures. 9/

ACCORDINGLY, IT IS ORDERED THAT:

1. The petition of the Environmental Defense Fund, Inc. be and it hereby is dismissed; and

2. The motion of Compagnie Nationale Air France to file a supplemental answer be and it hereby is granted.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR

Acting Secretary

(SEAL)

9/ In view of our disposition of this case, we do not reach other issues such as the question whether the barring of the Concorde would be consistent with treaty obligations of the United States.

Kennedy International Airport - Concorde Operations

The Executive Director recalled to the Board that on July 12, 1951 the Committee on Operations had adopted a Port Authority air terminal regulation providing that no jet aircraft may land or take off at a Port Authority air terminal without permission. This rule reflected the Authority's concern that noise from jet-powered aircraft would prove far more annoying to airport neighbors than that produced by piston aircraft.

Subsequently, Port Authority acoustics consultants developed a method for measuring a listener's reaction to this new aircraft noise, the perceived noise decibel, and, from 1958 to the present time, the Committee on Operations has used the PNdB to establish the Terms and Conditions governing jet operations at Port Authority airports.

The Port Authority's present jet Terms and Conditions at Kennedy International Airport require that takeoffs by jet aircraft be so planned and conducted that the noise level of 112 PNdB as measured on the ground in the neighboring communities will not be exceeded. Jet aircraft must also make over-water takeoffs during nighttime hours. The aviation industry, responding to the aircraft noise problem, has in recent years introduced jet aircraft that are quieter than their predecessors with one exception, the supersonic transport.

Airport operators and airport neighbors have therefore been apprehensive about the addition of noisier air transports to the civil aviation fleet - the airport neighbors because of the possible adverse effect such transports will have on their environment and the airport operators for the additional reason that the courts have imposed on them, and not on the Federal Government or the air carriers, financial liability for damages (takings) to neighboring property caused by the noise of low flying aircraft operating at public airports.

The Executive Director reviewed with the Board both the Federal Aviation Administration's final environmental impact statement relating to the request by British Airways and Air France for an amendment to their operations specifications to permit these carriers to fly the supersonic Concorde aircraft in limited commercial service at Kennedy International and Dulles International Airports and the February 4, 1976 decision of the Secretary of Transportation of the United States, William T. Coleman, Jr., directing the FAA to issue provisional amendments to such operations specifications. The restrictive amendments, which the Secretary justified on the basis of the Concorde's significantly different environmental characteristics, will permit each airline to

conduct during daylight hours up to two Concorde flights per day into Kennedy and one Concorde flight per day into Dulles, for a period of no longer than 16 months from the commencement of commercial service, subject to revocation at any time upon four months' notice or immediately in the event of an emergency being harmful to the health, welfare or safety of the American people.

At the direction of the Governor of New York, New York State's Commissioners of Transportation and Environmental Protection, Raymond Schuler and Ogden Reid, appeared before the February 25, 1976 meeting of the Operations Committee to express in detail the State's reasons for recommending that the Concorde be denied permission to use Kennedy International Airport. Excessive noise was identified by them as the principal objection to the Concorde. In addition, the Legislature of the State of New York has passed and the Governor has signed, proposed legislation that would mandate the Port Authority to deny permission to such aircraft to use Kennedy International Airport. Concurrent proposed legislation is pending in New Jersey.

Although it is claimed that the Concorde would meet the Port Authority's 112 PNdB standard by executing a low altitude turn shortly after take-off, the environmental impact statement and the Secretary's decision raise a number of significant questions concerning the effect of low frequency noise and vibrations generated by the Concorde and the airplane's overall impact on the noise environment in the area surrounding Kennedy. As Secretary Coleman points out, the Concorde's individual noise events will disturb more airport neighbors than the comparable range subsonic aircraft. The area exposed by the Concorde's take-off noise levels will be 47.6 square miles, approximately 6 times that exposed by the Boeing 707 and 15 times that by the Boeing-747. On landing, the area exposed by the Concorde, 11.1 square miles, will be approximately 5 times that exposed by the Boeing-707 and 20 times that by the Boeing-747. In addition, the Concorde engines generate low frequency energy and, consequently, induce higher levels of noise and structural vibrations in homes and other structures than do subsonic aircraft. The unique noise characteristics of the Concorde and the expected aggravated community response to this noise add new and serious dimensions to the present aircraft noise problem, one not necessarily reflected in the Port Authority's current noise standard.

Secretary Coleman has therefore concluded that the subjective characteristics of noise response to the Concorde "may best be evaluated through a controlled demonstration period of sufficient length to enable an assessment, after the initial publicity has subsided, of community

reaction to Concorde noise." He has therefore directed the FAA, the proprietor of Dulles International Airport, to permit the Concorde to operate at that airport. At Dulles, a facility double the size of Kennedy, less than 1,000 residents will be included within the noise exposure forecast 30 noise impact contour and none within the NEF 40 severe noise impact area. However, according to the environmental impact statement there are 485,000 persons within the NEF 30 contour at Kennedy and 112,000 within the NEF 40 contour. It does not appear to be in the public interest to test the subjective characteristics of noise response to the Concorde in the densely populated areas around Kennedy International Airport. In this regard it was noted that the Secretary had expressed the opinion that the elimination of Kennedy International Airport "would greatly diminish, but. . . . would not destroy, the validity of the demonstration." It is clear from the foregoing that a test at Dulles is clearly preferable as the actual performance and environmental results could be monitored without impacting so large a residential population. It is accordingly recommended that the Port Authority defer any action to permit supersonic aircraft, including the Concorde, from operating at Port Authority air terminals for a period not to exceed 6 months following the commencement of regular commercial operation of the Concorde at Dulles Airport.

It is further recommended that the Director of Aviation analyze the Concorde flights at Dulles, Heathrow and DeGaulle Airports and the communities' reaction thereto, and study the results of the Department of Transportation's mandated monitoring program for such 6 month period, and, if necessary, request the FAA to modify its program in order to provide the Port Authority with required data, or otherwise secure data, which would enable the Port Authority to apply this information to communities surrounding Kennedy International Airport.

In addition, the liability of the Port Authority for any claims for damages arising out of the Federally mandated operation of such aircraft requires a most thorough-going review and it is directed that General Counsel proceed to research and study the question, to contact the appropriate Federal agencies for possible liability coverage and to assess the airline operator's responsibility as well.

Whereupon, the following resolution was unanimously adopted:

> RESOLVED, that the Port Authority deny permission to operate any supersonic aircraft, including the Concorde, at Kennedy International Airport, until after at least six months of operating experience has been evaluated, after a report on such experience has been made to the Board and pending further action thereon by the Board; and it is further

RESOLVED, that the Director of Aviation is directed to analyze Concorde flights for a period of six months at Dulles International Airport and also at Heathrow and DeGaulle Airports, the community reaction thereto, the results of the Department of Transportation mandated monitoring program at Dulles, and, if necessary, request the Federal Aviation Administration to modify such program, or otherwise to secure additional information concerning the Concorde's noise and other environmental characteristics; and it is further

RESOLVED, that the Executive Director be and he hereby is authorized to retain such number of consultants in connection with the foregoing study as he may deem advisable; and it is further

RESOLVED, that the Executive Director and the Director of Aviation be and they hereby are directed, at the end of the foregoing six month program, based upon analysis of noise data and community reaction thereto, to make a recommendation to the Commissioners as to the acceptability of supersonic operations at Kennedy International Airport.

Whereupon, the meeting was adjourned.

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Secretary

LETTER TO HONORABLE MILTON POLLACK FROM PATRICK FALVEY OF THE PORT AUTHORITY, DATED APRIL 14, 1976
Pg. 430-432

THE PORT AUTHORITY OF NY & NJ

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June 3, 1976

Hon. Milton Pollack
U. S. Court House
Room No. 2102
Foley Square
New York, New York 10007

Re: British Airways Board, et al. v. Port Authority, et al. 76 Civ. 1276 (MP) - Motions to Intervene by Town of Hempstead et al and Friends of the Earth, Inc. et al

Dear Judge Pollack:

Although the Port Authority does not oppose the motions to intervene filed in this action, we nevertheless feel compelled to comment on two issues which intervenors raise that we believe are extraneous to the issue between the parties. That issue is whether, under federal statutes and treaties, the Port Authority, acting in its capacity as airport proprietor, has any power whatsoever to grant or deny permission for plaintiffs' supersonic aircraft to use Kennedy Airport. The movants will raise, and needlessly so, whether the Port Authority's action in barning such aircraft, including the Concorde, can be construed as an exercise of the police power of the two States of which the Port Authority is an agency and whether the Concorde can meet the Port Authority's existing 112 PNdB standard applicable to subsonic jet aircraft.

1. The Legal Basis For The Port Authority's Concorde Resolution

The suggestion by the Town of Hempstead et al that the resolution of the Port Authority's Board of Commissioners relating to the Concorde was adopted to protect the health and welfare of Kennedy Airport's neighbors may well have the unfortunate, and we believe unintended, result of broadening the legal issues in this suit by enabling plaintiffs to argue that the ban is clearly unconstitutional under the 1973 decision in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624. In Burbank the Supreme Court held that all state and local police power regulations in the field of aircraft noise abatement have been preempted by Congress for exclusive control by the Federal

Government. The fact is that the sole legal basis for the Port Authority's aircraft noise restrictions, including the restriction at issue in this litigation, has been the inherent right of a landlord under the common law to control the use of its property and reasonably to regulate such use. An airport operator's right to impose such restrictions when acting in its capacity as an airport proprietor - which is the only issue in this case - was not involved in Burbank and, indeed, was expressly excluded by the Supreme Court from its decision in that case.

2. Answer of Intervenors, Town of Hempstead, et al.

The fourth defense contained in the proposed answer by the Town of Hempstead et al clearly raises an issue which is not germane to this litigation. That defense asserts that plaintiffs' suit must be dismissed because the Concorde cannot meet the Port Authority's existing noise restrictions applicable to subsonic jet aircraft (112 PNdB on takeoff). However, the Port Authority resolution of March 11, 1976, which is the subject of this litigation, does not apply the 112 PNdB standard to the Concorde. Instead, it denies permission for any supersonic aircraft, including the Concorde, to operate at Kennedy Airport pending an in depth analysis of the Concorde's noise characteristics and an evaluation of community reaction thereto. As the resolution indicates, a major purpose of the study is to determine whether the perceived noise decibel (PNdB), which was developed by Port Authority acoustical consultants to measure a listener's subjective reaction to the high frequency noise generated by subsonic aircraft compared with that of piston aircraft, is a valid measurement of a listener's subjective reaction to the low frequency noise and vibrations generated by the Concorde. It is entirely possible that the 112 PNdB standard is unsuitable for application to the Concorde. It would thus appear that Hempstead et al's fourth defense which is based on the inability of the Concorde to meet the 112 PNdB limitation stems from a misunderstanding of the purpose and scope of the Port Authority resolution involved in this litigation.

In addition, we cannot allow to go unchallenged the wholly unwarranted assertion made by both sets of intervenors that, for a variety of reasons, including the possibility of increased revenues from Concorde operations, the Port Authority may not defend this law suit with due diligence. Suffice it to say that the possibility of increased revenues did not prevent the Port Authority from imposing takeoff noise restrictions on subsonic jet aircraft from 1958 to the present time; nor did it

prevent the Port Authority from obtaining an injunction compelling United Airlines to comply with a temporary ban on the use of jet aircraft on a runway at LaGuardia Airport. Port of New York Authority v. Eastern Airlines, 259 F. Supp. 745 (E.D.N.Y. 1966). Indeed the vigilance with which the Port Authority has acted to preserve the integrity of its airport noise restrictions is illustrated by its participation amicus curiae in the Burbank case. I believe that it was directly in response to the arguments contained in our brief, that the Supreme Court's opinion in that case not only distinguished between police power regulation and an airport operator's restrictions but also specifically limited the scope of its decision to police power measures.

Respectfully,

Patrick J. Falvey

Patrick J. Falvey
General Counsel

cc: William C. Clarke, Esq.,
attorney for British Airways Board

Rogers & Wells, Esqs.,
attorneys for Compagnie Nationale Air France

William D. Denson, Esq.,
attorney for Town of Hempstead, et al.

Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, Esqs.,
attorneys for Friends of the Earth, et al.

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Establishment of Panel for Liaison with Representatives of Communities Surrounding Kennedy International Airport.

It was recalled to the Board that on March 11, 1976, it denied permission for the operation of any supersonic aircraft, including the Concorde, at Kennedy International Airport until at least 6 months of operating experience of the aircraft had been evaluated by the Executive Director and the Director of Aviation. Prior to taking this action on March 11, 1976, the Board heard the views of Queens Borough President Manes, Nassau County Executive Ralph Caso and Mayor William D. Denson of Lawrence. Since that time, Port Authority consultants and staff have been analyzing the Concorde noise characteristics and community reaction thereto. Members of the communities surrounding Kennedy International Airport have also been studying data pertaining to the Concorde noise characteristics and community reaction, and have communicated their views to the Port Authority. It would appear that before the Board takes further action on proposed supersonic aircraft operations at Kennedy International Airport, it would be desirable to receive additional comments and information on this issue from the leaders and representatives of the people living in the vicinity of Kennedy International Airport.

Whereupon, the following resolution was unanimously adopted:

RESOLVED, that the Executive Director be and he hereby is directed to create a panel of representatives of the Aviation, Law and Public Affairs Departments to meet with elected representatives and other community leaders from the area surrounding Kennedy International Airport to receive their comments and information and to include their comments and suggestions in the staff report to the Board on the acceptability or non-acceptability of supersonic aircraft operations at Kennedy International Airport.

Whereupon, the meeting was adjourned.

_____

Secretary

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM RELATING TO AIR SERVICES BETWEEN THEIR RESPECTIVE TERRITORIES ("BERMUDA AGREEMENT"), dated Feb. 11, 1946
Pg. 434-446

434 a

AIR TRANSPORT SERVICES

Agreement, with annex, signed at Bermuda February 11, 1946
Entered into force February 11, 1946
Amended by agreements of December 20, 1946, and January 27, 1947;[1] *May 21 and 23, 1947;*[2] *January 14, 1948;*[3] *August 4 and 16, 1955;*[4] *October 17 and 30, 1956;*[5] *December 2 and 28, 1956;*[6] *and May 27, 1966*[7]

60 Stat. 1499, Treaties and Other International Acts Series 1507

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM RELATING TO AIR SERVICES BETWEEN THEIR RESPECTIVE TERRITORIES

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland,

Desiring to conclude an Agreement for the purpose of promoting direct air communications as soon as possible between their respective territories,

Have accordingly appointed authorised representatives for this purpose, who have agreed as follows:

ARTICLE 1

Each Contracting Party grants to the other Contracting Party rights to the extent described in the Annex to this Agreement for the purpose of the establishment of air services described therein or as amended in accordance with Section IV of the Annex (hereinafter referred to as "the agreed services").

ARTICLE 2

(1) The agreed services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the rights are granted,

[1] TIAS 1640, *post*, p. 809.
[2] TIAS 1641, *post*, p. 814.
[3] TIAS 1714, *post*, p. 847.
[4] 6 UST 2919; TIAS 3338.
[5] 7 UST 2934; TIAS 3675.
[6] 7 UST 3451; TIAS 3719.
[7] 17 UST 683; TIAS 6019.

but not before (a) the Contracting Party to whom the rights have been granted has designated an air carrier or carriers for the specified route or routes, and (b) the Contracting Party granting the rights has given the appropriate operating permission to the air carrier or carriers concerned (which, subject to the provisions of paragraph (2) of this Article and of Article 6, it shall do without undue delay).

(2) The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfil the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers.

(3) In areas of military occupation, or in areas affected thereby, such inauguration will continue to be subject, where necessary, to the approval of the competent military authorities.

Article 3

(1) The charges which either of the Contracting Parties may impose, or permit to be imposed, on the designated air carrier or carriers of the other Contracting Party for the use of airports and other facilities shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international air services.

(2) Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one Contracting Party by, or on behalf of, a designated air carrier of the other Contracting Party and intended solely for use by the aircraft of such carrier shall be accorded, with respect to customs duties, inspection fees or other charges imposed by the former Contracting Party, treatment not less favourable than that granted to national air carriers engaged in international air services or such carriers of the most favoured nation.

(3) Supplies of fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board aircraft of a designated air carrier of one Contracting Party shall be exempt in the territory of the other Contracting Party from customs duties, inspection fees or similar duties or charges, even though such supplies be used by such aircraft on flights within that territory.

Article 4

Certificates of airworthiness, certificates of competency and licenses issued or rendered valid by one Contracting Party and still in force shall be recognised as valid by the other Contracting Party for the purpose of operation of the agreed services. Each Contracting Party reserves the right, however, to refuse to recognise for the purpose of flight above its own territory, certificates of competency and licenses granted to its own nationals by another state.

ARTICLE 5

(1) The laws and regulations of one Contracting Party relating to entry into or departure from its territory of aircraft engaged in international air navigation or to the operation and navigation of such aircraft while within its territory shall apply to aircraft of the designated air carrier or carriers of the other Contracting Party.

(2) The laws and regulations of one Contracting Party relating to the entry into or departure from its territory of passengers, crew, or cargo of aircraft (such as regulations relating to entry, clearance, immigration, passports, customs and quarantine) shall be applicable to the passengers, crew or cargo of the aircraft of the designated air carrier or carriers of the other Contracting Party while in the territory of the first Contracting Party.

ARTICLE 6

Each Contracting Party reserves the right to withhold or revoke the exercise of the rights specified in the Annex to this Agreement by a carrier designated by the other Contracting Party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of either Contracting Party, or in case of failure by that carrier to comply with the laws and regulations referred to in Article 5 hereof, or otherwise to fulfil the conditions under which the rights are granted in accordance with this Agreement and its Annex.

ARTICLE 7

This Agreement shall be registered with the Provisional International Civil Aviation Organisation set up by the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944.[8]

ARTICLE 8

Except as otherwise provided in this Agreement or its Annex, if either of the Contracting Parties considers it desirable to modify the terms of the Annex to this Agreement, it may request consultation between the aeronautical authorities of both Contracting Parties, such consultation to begin within a period of sixty days from the date of the request. When these authorities agree on modifications to the Annex, these modifications will come into effect when they have been confirmed by an Exchange of Notes through the diplomatic channel.

ARTICLE 9

Except as otherwise provided in this Agreement or in its Annex, any dispute between the Contracting Parties relating to the interpretation or application

[8] EAS 469, *ante*, vol. 3, p. 929.

of this Agreement or its Annex which cannot be settled through consultation shall be referred for an advisory report to the Interim Council of the Provisional International Civil Aviation Organisation (in accordance with the provisions of Article III Section 6(8) of the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944) or its successor.

ARTICLE 10

The terms and conditions of operating rights which may have been granted previously by either Contracting Party to the other Contracting Party or to an air carrier of such other Contracting Party shall not be abrogated by the present Agreement. Except as may be modified by the present Agreement, the general principles of the air navigation arrangement between the two Contracting Parties, which was effected by an Exchange of Notes dated March 28 and April 5, 1935,* shall continue in force in so far as they are applicable to scheduled international air services, until otherwise agreed by the Contracting Parties.

ARTICLE 11

If a general multilateral air Convention enters into force in relation to both Contracting Parties, the present Agreement shall be amended so as to conform with the provisions of such Convention.

ARTICLE 12

For the purposes of this Agreement and its Annex, unless the context otherwise requires:

(a) The term "aeronautical authorities" shall mean, in the case of the United States, the Civil Aeronautics Board and any person or body authorised to perform the functions presently exercised by the Board or similar functions, and, in the case of the United Kingdom, the Minister of Civil Aviation for the time being, and any person or body authorised to perform any functions presently exercised by the said Minister or similar functions.

(b) The term "designated air carriers" shall mean the air transport enterprises which the aeronautical authorities of one of the Contracting Parties have notified in writing to the aeronautical authorities of the other Contracting Party as the air carriers designated by it in accordance with Article 2 of this Agreement for the routes specified in such notification.

(c) The term "territory" shall have the meaning assigned to it by Article 2 of the Convention on International Civil Aviation signed at Chicago on December 7, 1944.**

* EAS 76, *ante*, p. 501.
** TIAS 1591, *ante*, vol. 3, p. 944.

(d) The definitions contained in paragraphs (a), (b) and (d) of Article 96 of the Convention on International Civil Aviation signed at Chicago on December 7, 1944 shall apply.

ARTICLE 13

Either Contracting Party may at any time request consultation with the other with a view to initiating any amendments of this Agreement or its Annex which may be desirable in the light of experience. Pending the outcome of such consultation, it shall be open to either Party at any time to give notice to the other of its desire to terminate this Agreement. Such notice shall be simultaneously communicated to the Provisional International Civil Aviation Organisation or its successor. If such notice is given, this Agreement shall terminate twelve calendar months after the date of receipt of the notice by the other Contracting Party, unless the notice to terminate is withdrawn by agreement before the expiry of this period. In the absence of acknowledgment of receipt by the other Contracting Party notice shall be deemed to have been received fourteen days after the receipt of the notice by the Provisional International Civil Aviation Organisation or its successor.

ARTICLE 14

This Agreement, including the provisions of the Annex hereto, will come into force on the day it is signed.

IN WITNESS whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

DONE in duplicate this eleventh day of February Nineteen-hundred-and-forty-six at Bermuda.

For the Government of the United States of America

GEORGE P. BAKER
HARLLEE BRANCH
STOKELEY W. MORGAN
GARRISON NORTON
L. WELCH POGUE
OSWALD RYAN

For the Government of the United Kingdom of Great Britain and Northern Ireland

A. H. SELF
W. P. HILDRED
W. J. BIGG
L. J. DUNNETT
PETER G. MASEFIELD

ANNEX

I

For the purposes of operating air services on the routes specified below in Section III of this Annex or as amended in accordance with Section IV hereof, the designated air carriers of one of the Contracting Parties shall be accorded in the territory of the other Contracting Party the use on the said routes at each of the places specified therein of all the airports (being airports designated for international air services), together with ancillary facilities and rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail in full accord and compliance with the principles recited and agreed in the Final Act of the Conference on Civil Aviation held between the Governments of the United States and of the United Kingdom at Bermuda from January 15 to February 11, 1946, and subject to the provisions of Sections II and V of this Annex.

II

(a) Rates to be charged by the air carriers of either Contracting Party between points in the territory of the United States and points in the territory of the United Kingdom referred to in this Annex shall be subject to the approval of the Contracting Parties within their respective constitutional powers and obligations. In the event of disagreement the matter in dispute shall be handled as provided below.

(b) The Civil Aeronautics Board of the United States having announced its intention to approve the rate conference machinery of the International Air Transport Association (hereinafter called "IATA"), as submitted, for a period of one year beginning in February, 1946, any rate agreements concluded through this machinery during this period and involving United States air carriers will be subject to approval by the Board.

(c) Any new rate proposed by the air carrier or carriers of either Contracting Party shall be filed with the aeronautical authorities of both Contracting Parties at least thirty days before the proposed date of introduction; provided that this period of thirty days may be reduced in particular cases if so agreed by the aeronautical authorities of both Contracting Parties.

(d) The Contracting Parties hereby agree that where:

(1) during the period of the Board's approval of the IATA rate conference machinery, either any specific rate agreement is not approved within a reasonable time by either Contracting Party or a conference of IATA is unable to agree on a rate, or

(2) at any time no IATA machinery is applicable, or

(3) either Contracting Party at any time withdraws or fails to renew its approval of that part of the IATA rate conference machinery relevant to this provision,

the procedure described in paragraphs (e), (f) and (g) hereof shall apply.

(e) In the event that power is conferred by law upon the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States, each of the Contracting Parties shall thereafter exercise its authority in such manner as to prevent any rate or rates proposed by one of its carriers for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party from becoming effective, if, in the judgment of the aeronautical authorities of the Contracting Party whose air carrier or carriers is or are proposing such rate, that rate is unfair or uneconomic. If one of the Contracting Parties on receipt of the notification referred to in paragraph (c) above is dissatisfied with the new rate proposed by the air carrier or carriers of the other Contracting Party, it shall so notify the other Contracting Party prior to the expiry of the first fifteen of the thirty days referred to, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached each Contracting Party will exercise its statutory powers to give effect to such agreement. If agreement has not been reached at the end of the thirty day period referred to in paragraph (c) above, the proposed rate may, unless the aeronautical authorities of the country of the air carrier concerned see fit to suspend its operation, go into effect provisionally pending the settlement of any dispute in accordance with the procedure outlined in paragraph (g) below.

(f) Prior to the time when such power may be conferred by law upon the aeronautical authorities of the United States, if one of the Contracting Parties is dissatisfied with any new rate proposed by the air carrier or carriers of either Contracting Party for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party, it shall so notify the other prior to the expiry of the first fifteen of the thirty day period referred to in paragraph (c) above, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached each Contracting Party will use its best efforts to cause such agreed rate to be put into effect by its air carrier or carriers. It is recognised that if no such agreement can be reached prior to the expiry of such thirty days, the Contracting Party raising the objection to the rate may take such steps as it may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of.

(g) When in any case under paragraphs (e) and (f) above the aeronautical authorities of the two Contracting Parties cannot agree within a reasonable time upon the appropriate rate after consultation initiated by the complaint of one Contracting Party concerning the proposed rate or an existing rate of the air carrier or carriers of the other Contracting Party, upon the

request of either, both Contracting Parties shall submit the question to the Provisional International Civil Aviation Organisation or to its successor for an advisory report, and each Party will use its best efforts under the powers available to it to put into effect the opinion expressed in such report.

(h) The rates to be agreed in accordance with the above paragraphs shall be fixed at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by any other air carriers.

(i) The Executive Branch of the Government of the United States agrees to use its best efforts to secure legislation empowering the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States.

III

(a) ROUTES TO BE SERVED BY AIR CARRIERS OF THE UNITED KINGDOM

(In both directions; stops for non-traffic purposes omitted)

POINT OF DEPARTURE (Any one or more of the following)	INTERMEDIATE POINTS (Any one or more of the following, if desired)	DESTINATION IN U.S. TERRITORY (Any one or more of the following, if desired)	POINTS BEYOND (Any one or more of the following, if desired)
1. London		New York	San Francisco and the points on Route 7.
2. London Prestwick	Shannon Iceland Azores Bermuda Gander Montreal	New York Chicago Detroit Philadelphia Washington Baltimore Boston	
3. *London Prestwick	Shannon Iceland Azores Bermuda Gander Montreal	New York	(a) New Orleans Mexico City (b) Cuba Jamaica Panama A point in Colombia A point in Ecuador Lima Santiago

*Notice will be given by the aeronautical authorities of the United Kingdom to the aeronautical authorities of the United States of the route service patterns according to which services will be inaugurated on these routes.

(a) ROUTES TO BE SERVED BY AIR CARRIERS OF THE UNITED KINGDOM—Continued

POINT OF DEPARTURE (Any one or more of the following)	INTERMEDIATE POINTS (Any one or more of the following, if desired)	DESTINATION IN U.S. TERRITORY (Any one or more of the following, if desired)	POINTS BEYOND (Any one or more of the following, if desired)
4. Bermuda		Baltimore Washington New York	Montreal
5. *Trinidad British Guiana Jamaica British Honduras	Tobago Barbados Grenada St. Vincent St. Lucia Antigua St. Kitts St. Thomas San Juan Ciudad Trujillo Port au Prince Jamaica Cuba Nassau Bermuda	Miami	
6. Nassau Cat Cay		Miami Palm Beach	
7. Singapore Hong Kong	Manila Guam Wake Midway Honolulu	San Francisco	

*Notice will be given by the aeronautical authorities of the United Kingdom to the aeronautical authorities of the United States of the route service patterns according to which services will be inaugurated on these routes.

(b) ROUTES TO BE SERVED BY AIR CARRIERS OF THE UNITED STATES
(In both directions; stops for non-traffic purposes omitted)

POINT OF DEPARTURE (Any one or more of the following)	INTERMEDIATE POINTS (Any one or more of the following, if desired)	DESTINATION IN U. K. TERRITORY (Any one or more of the following, if desired)	POINTS BEYOND (Any one or more of the following, if desired)
1. *Chicago Detroit Washington Philadelphia New York Boston Baltimore	Gander Greenland Iceland Shannon	London Prestwick	Amsterdam Helsinki Copenhagen Stavanger Oslo Stockholm Warsaw Berlin Frankfurt Moscow Leningrad Points in the Baltic countries
2. *New York Chicago Philadelphia Baltimore Washington Boston Detroit	Gander Greenland Iceland Shannon	London Prestwick	Brussels Munich Prague Vienna Budapest Belgrade Bucharest Istanbul Ankara A point in Iran Beirut A point in Syria A point in Iraq A point in Afghanistan Karachi Delhi Calcutta
3. *Chicago Detroit Washington New York Boston Baltimore Philadelphia	Gander Shannon Greenland Iceland Paris A point in Switzerland Rome Athens Cairo	Lydda	A point in Iraq Dhahran Bombay Calcutta A point in Burma A point in Siam A point or points in Indo-China A point or points in China

*Notice will be given by the aeronautical authorities of the United Kingdom to the aeronautical authorities of the United States of the route service patterns according to which services will be inaugurated on these routes.

(b) ROUTES TO BE SERVED BY AIR CARRIERS OF THE UNITED STATES—Continued

POINT OF DEPARTURE (Any one or more of the following)	INTERMEDIATE POINTS (Any one or more of the following, if desired)	DESTINATION IN U. K. TERRITORY (Any one or more of the following, if desired)	POINTS BEYOND (Any one or more of the following, if desired)
4. Chicago Detroit Washington New York Boston Baltimore Philadelphia	Gander Azores Lisbon (a) Algiers Tunis Tripoli Benghazi Cairo (b) Madrid Rome Athens Cairo	Lydda	From Lydda to points beyond as described in Route 3
5. New York Chicago Detroit Washington Philadelphia Boston Baltimore	Gander Bermuda Azores	London	(From the Azores) Lisbon Barcelona Marseilles
6. *San Francisco Los Angeles	Honolulu Midway Wake Guam Manila	Hong Kong	Macao A point or points in China A point or points in Indo-China A point or points in Siam A point or points in Burma Calcutta
7. *San Francisco Los Angeles	Honolulu Midway Wake Guam Manila A point or points in Indo-China	Singapore	Batavia
8. New York Washington Baltimore		Bermuda	
9. Miami Palm Beach		Cat Cay Nassau	

*Notice will be given by the aeronautical authorities of the United States to the aeronautical authorities of the United Kingdom of the route service patterns according to which services will be inaugurated on these routes.

(b) ROUTES TO BE SERVED BY AIR CARRIERS OF THE UNITED STATES—Continued

POINT OF DEPARTURE (Any one or more of the following)	INTERMEDIATE POINTS (Any one or more of the following, if desired)	DESTINATION IN U. K. TERRITORY (Any one or more of the following, if desired)	POINTS BEYOND (Any one or more of the following, if desired)
10. Miami	Points in Cuba	Jamaica	(a) Baranquilla via South American points to Balboa (b) Baranquilla via South American points to Trinidad
11. New Orleans Houston	Points in Cuba	Jamaica	Aruba South American points
12. New York Miami	Camaguey Port au Prince Cuidad Trujillo San Juan Saint Thomas Point a Pitre Fort de France	Antigua St. Lucia Trinidad British Guiana	Via South American points to Buenos Aires
13. New York	(a) Azores Dakar Monrovia (b) San Juan Trinidad British Guiana Belem Natal Monrovia Ascension Island	Accra or Lagos	Leopoldville Johannesburg

IV

(a) Amendments made by either Contracting Party to the routes described in Section III of this Annex which change the points served in the territory of the other Contracting Party will be made only after consultation in accordance with the provisions of Article 8 of this Agreement.

(b) Other route changes desired by either Contracting Party may be made and put into effect at any time, prompt notice to that effect being given by the aeronautical authorities of the Contracting Party concerned to the aeronautical authorities of the other Contracting Party. If such other Contracting Party finds that, having regard to the principles set forth in paragraph (6) of the Final Act of the Conference referred to in Section I of this Annex, the interests of its air carrier or carriers are prejudiced by the carriage by the air carrier or carriers of the first Contracting Party of traffic between the ter-

ritory of the second Contracting Party and the new point in the territory of a third country it shall so inform the first Contracting Party. If agreement cannot be reached by consultation between the Contracting Parties, it shall be open to the Contracting Party whose air carrier or carriers is or are affected to invoke the provisions of Article 9 of this Agreement.

(c) The Contracting Parties will, as soon as possible after the execution of this Agreement and from time to time thereafter, exchange information concerning the authorisations extended to their respective designated air carriers to render service to, through and from the territory of the other Contracting Party. This will include copies of current certificates and authorisations for service on the routes which are the subject of this Agreement, and for the future such new certificates and authorisations as may be issued, together with amendments, exemption orders and authorised service patterns.

V

(a) Where the onward carriage of traffic by an aircraft of different size from that employed on the earlier stage of the same route (hereinafter referred to as "change of gauge") is justified by reason of economy of operation, such change of gauge at a point in the territory of the United Kingdom or the territory of the United States shall not be made in violation of the principles set forth in the Final Act of the Conference on Civil Aviation held at Bermuda from January 15 to February 11, 1946 and, in particular, shall be subject to there being an adequate volume of through traffic.

(b) Where a change of gauge is made at a point in the territory of the United Kingdom or in the territory of the United States, the smaller aircraft will operate only in connection with the larger aircraft arriving at the point of change, so as to provide a connecting service which will thus normally wait on the arrival of the larger aircraft, for the primary purpose of carrying onward those passengers who have travelled to United Kingdom or United States territory in the larger aircraft to their ultimate destination in the smaller aircraft. Where there are vacancies in the smaller aircraft such vacancies may be filled with passengers from United Kingdom or United States territory respectively. It is understood however that the capacity of the smaller aircraft shall be determined with primary reference to the traffic travelling in the larger aircraft normally requiring to be carried onward.

(c) It is agreed that the arrangements under any part of the preceding paragraphs (a) and (b) shall be governed by and in no way restrictive of the standards set forth in paragraph (6) of the Final Act.

A. H. S.	G. P. B.	
W. J. B.	H. B.	O. R.
W. P. H.	S. M.	
L. J. D.	G. N.	
P. G. M.	L. W. P.	

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE PROVISIONAL GOVERNMENT OF THE FRENCH REPUBLIC RELATING TO AIR SERVICES BETWEEN THEIR RESPECTIVE TERRITORIES ("PARIS AGREEMENT"), DATED March 27, 1946 - Pg. 447-459

447 a

AIR TRANSPORT SERVICES

Agreement signed at Paris March 27, 1946, with annex, schedules, and protocol of signature
Entered into force March 27, 1946
Extended and amended by agreements of June 23 and July 11, 1950;[1] *March 19, 1951;*[2] *and August 27, 1959*[3]
Supplemented by agreement of April 5, 1960[4]

61 Stat. 3445; Treaties and Other International Acts Series 1679

Agreement Between the Government of the United States of America and the Provisional Government of the French Republic Relating to Air Services Between Their Respective Territories

The Government of the United States of America and the Provisional Government of the French Republic

considering

—that the possibilities of commercial aviation as a means of transport have greatly increased,

—that it is desirable to organize the international air services in a safe and orderly manner and to further as much as possible the development of international cooperation in this field, and

—that the Agreements hitherto contracted between the two governments with respect to the operation of air services should be replaced by a more general agreement in harmony with the new conditions of air transport,

have appointed their representatives, who, duly authorized, have agreed upon the following:

Article I

The Contracting Parties grant to each other the rights specified in the Annex hereto for the establishment of the international air services set

[1] 1 UST 593; TIAS 2106.
[2] 2 UST 1033, 1037; TIAS 2257, 2258.
[3] 10 UST 1791; TIAS 4336.
[4] 13 UST 1860; TIAS 5135.

forth in that Annex, or as amended in accordance with Article XII * of the present Agreement (hereinafter referred to as the "agreed services").

Article II

(a) The agreed services may be inaugurated immediately or at a later date at the option of the Contracting Party to whom the rights are granted, on condition that:

(1) the Contracting Party to whom the rights have been granted shall have designated an air carrier or carriers for the specified route or routes,

(2) the Contracting Party which grants the rights shall have given the appropriate operating permission to the air carrier or carriers concerned pursuant to paragraph (b) of this Article which (subject to the provisions of Article VI) it shall do with the least possible delay.

(b) The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfill the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers.

Article III

(a) The charges which either Contracting Party may impose or permit to be imposed on the designated air carrier or carriers of the other Contracting Party for the use of airports and other facilities shall not be higher than would be paid for the use of such airports and facilities by its national aircraft employed in similar international air services.

(b) Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one Contracting Party by, or on behalf of, any designated air carrier of the other Contracting Party and intended solely for use by the aircraft of such carrier shall be accorded, with respect to customs duties, inspection fees and other charges imposed by the former Contracting Party, treatment not less favorable than that granted to national air carriers engaged in international air services or such carriers of the most favored nation.

(c) Supplies of fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board aircraft of any designated air carrier of one Contracting Party shall be exempt in the territory of the other Contracting Party from customs duties, inspection fees or similar duties or charges, even though such supplies be used by such aircraft on flights within that territory.

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* By an exchange of notes dated Feb. 19 and Mar. 10, 1947, between the American Embassy at Paris and the French Ministry of Foreign Affairs it was agreed that "Article XII" should read "Article XIII".

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Article IV

Certificates of airworthiness, certificates of competency and licenses issued or rendered valid by one Contracting Party and still in force shall be recognised as valid by the other Contracting Party for the purpose of operation of the agreed services. Each Contracting Party reserves the right, however, to refuse to recognise for the purpose of flight above its own territory, certificates of competency and licenses granted to its own nationals by another state.

Article V

(a) The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the other Contracting Party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first party.

(b) The laws and regulations of each Contracting Party as to the admission to, sojourn in and departure from its territory of passengers, crew and cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs and quarantine, shall be observed.

Article VI

Each Contracting Party reserves the right to withhold or revoke a certificate or permit to an air carrier designated by the other Contracting Party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of either Contracting Party, or in case of failure by that carrier to comply with the laws and regulations referred to in Article V hereof, or otherwise to fulfill the conditions under which the rights are granted in accordance with this Agreement and its Annex.

Article VII

(a) In addition to the rights mentioned in Article I of the present Agreement, each Contracting Party grants to all air carriers of the other Contracting Party for international air services (and for all operational flights incidental to such services):

(1) The right to fly across its territory without landing;
(2) The right to land in such territory for non-traffic purposes.

(b) In order to carry out the purposes of paragraph (a) above, each Contracting Party may designate the airways to be followed within its territory by any air carrier of the other Contracting Party, and the airports which any such services may use.

(c) The exercise of the rights specified in paragraph (a) above is subject to the provisions of Articles III, IV, V and VI of this Agreement and the Articles which follow.

(d) The rights granted under the present Article by the Government of the United States to French air carriers may be exercised at Kindley Field (Bermuda) provided the Government of the French Republic shall have obtained the necessary authorizations from the Government of the United Kingdom of Great Britain and Northern Ireland.

Article VIII

In a spirit of close collaboration, the aeronautical authorities of the two Contracting Parties will consult regularly with a view to assuring the observance of the principles and the implementation of the provisions outlined in the present Agreement and its Annex.

Article IX

For the purpose of the present Agreement and its Annex:

(a) The term "territory" as applied to each Contracting Party shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection, mandate, or trusteeship of such Contracting Party.

(b) The term "aeronautical authorities" shall mean in the case of France "le Secrétaire Général à l'Aviation Civile et Commerciale" and in the case of the United States the Civil Aeronautics Board, and in both cases any person or body authorized to perform the functions presently exercised by the above mentioned bodies.

(c) The term "international air services" shall have the meaning specified in Article 96 of the Convention on International Civil Aviation signed at Chicago on December 7, 1944.[6]

Article X

Except as otherwise provided in this agreement or its Annex, any dispute between the Contracting Parties relating to the interpretation or application of this Agreement or its Annex which cannot be settled through consultation, shall be referred for an advisory report to the Interim Council of the Provisional International Civil Aviation Organization, in accordance with the provisions of Article III, Section 6(8) of the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944,[7] or its successor.

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[6] TIAS 1591, *ante*, vol. 3, p. 944.
[7] EAS 469, *ante*, vol. 3, p. 929.

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ARTICLE XI

The present Agreement supersedes the Air Transport Agreement concluded between the two Contracting Parties by an exchange of notes signed July 15, 1939,* as well as the Provisional Arrangement of December 28 and 29, 1945.*

The present Agreement shall in no way affect the Agreement concluded in Noumea on December 22, 1938 between the Governor of New Caledonia and a United States air carrier, or any amendments thereof.

ARTICLE XII

This Agreement and all relative contracts shall be registered with the Provisional International Civil Aviation Organization set up by the Interim Agreement on International Civil Aviation signed at Chicago December 7, 1944, or its successor.

ARTICLE XIII

(a) This Agreement, including the provisions of the Annex thereof, will come into force on the day it is signed.

(b) Either Contracting Party may at any time request consultation with the other with a view to initiating any amendments of this Agreement or its Annex which may be desirable in the light of experience. If a multilateral air convention enters into force in relation to both Contracting Parties, such consultation shall take place with a view to amending the present Agreement or its Annex so as to conform to the provisions of such a convention.

(c) Except as otherwise provided in this Agreement or its Annex, if either of the Contracting Parties considers it desirable to modify the terms of the Annex to this Agreement it may request consultation to begin within a period of sixty days from the date of the request. Any modification in the Annex agreed to by said aeronautical authorities shall come into effect when it has been confirmed by an exchange of diplomatic notes.

(d) When the procedure for a consultation provided for in paragraph (b) of the present Article has been initiated, either Contracting Party may at any time give notice to the other of its desire to terminate this Agreement. Such notice shall be simultaneously communicated to the Provisional International Civil Aviation Organization, or its successor.

This Agreement shall terminate one year after the date of receipt of the notice to terminate by the other Contracting Party unless the notice is withdrawn by agreement before the expiration of this period. In the absence of acknowledgment of receipt by the other Contracting Party, notice shall be

* EAS 153, *ante*, p. 1042.
* TIAS 1679, *ante*, p. 1102.

deemed to have been received fourteen days after the receipt of the notice by the Provisional International Civil Aviation Organization or its successor.

DONE at Paris , 1946,[10] in duplicate in the English and French languages, each of which shall be of equal authenticity.

For the Government of the United States of America

JEFFERSON CAFFERY
L. WELCH POGUE
GEORGE P. BAKER

For the Provisional Government of the French Republic

JULES MOCH
G. BIDAULT

ANNEX

SECTION I

The Government of the United States of America grants to the Government of the French Republic the right to conduct air transport services by one or more air carriers of French nationality designated by the latter country on the routes, specified in Schedule I attached, which transit or serve commercially the territory of the United States of America.

SECTION II

The Government of the French Republic grants to the Government of the United States of America the right to conduct air transport services by one or more air carriers of United States nationality designated by the latter country on the routes, specified in Schedule II attached, which transit or serve commercially French territory.

SECTION III

One or more air carriers designated by each of the Contracting Parties under the conditions provided in this Agreement will enjoy, in the territory of the other Contracting Party, rights of transit, of steps for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail at the points enumerated and on each of the routes specified in the schedules attached at all airports open to international traffic.

[10] By an exchange of notes dated Feb. 19 and Mar. 10, 1947, between the American Embassy at Paris and the French Ministry of Foreign Affairs, it was agreed that the date of signature was omitted inadvertently and that this passage should read "DONE at Paris March 27, 1946,".

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SECTION IV

It is agreed between the Contracting Parties:

(a) That the two governments desire to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles; and to stimulate international air travel as a means of promoting friendly understanding and good will among peoples and insuring as well the many indirect benefits of this new form of transportation to the common welfare of both countries.

(b) That in the operation by the air carriers of either Contracting Party of trunk services described in the present Annex, the interests of the air carriers of the other country shall, however, be taken into consideration so as not to effect unduly the services which the latter provide on all or part of the same route.

(c) That the air transport services offered by the carriers of both countries should bear a close relationship to the requirements of the public for such services.

(d) That the services provided by a designated air carrier under this Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic; and

—that the right of the air carriers of either country to embark and to disembark at points in the territory of the other country international traffic destined for or coming from third countries at a point or points specified in the Schedules attached, shall be applied in accordance with the general principles or orderly development to which both governments subscribe and shall be subject to the general principle that capacity shall be related.

(1) to traffic requirements between the country of origin and the countries of destination,

(2) to the requirements of through airline operation, and

(3) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

SECTION V

(a) The determination of rates in accordance with the following paragraphs shall be made at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit, and the rates charged by any other carriers, as well as the characteristics of each service.

(b) The rates to be charged by the air carriers of either Contracting Party between the points in the territory of the United States and points in French territory referred to in this Annex shall, consistent with the pro-

visions of the present Agreement and its Annex, be subject to the approval of the aeronautical authorities of the Contracting Parties, who shall act in accordance with their obligations under the present Annex, within the limits of their legal powers.

(c) The Civil Aeronautics Board of the United States having approved the traffic conference machinery of the International Air Transport Association (Hereinafter called "IATA"), for a period of one year beginning in February 1946, any rate agreements concluded through this machinery during this period and involving United States air carriers will be subject to approval by the Board.

(d) Any rate proposed by the air carrier or carriers of either Contracting Party shall be filed with the aeronautical authorities of both Contracting Parties at least thirty days before the proposed date of introduction; provided that this period of thirty days may be reduced in particular cases if so agreed by the aeronautical authorities of both Contracting Parties.

(e) The Contracting Parties agree that the procedure described in paragraphs (f), (g) and (h) of this Section shall apply

(1) if during the period of the Civil Aeronautics Board's approval of the IATA traffic conference machinery, either any specific rate agreement is not approved within a reasonable time by either Contracting Party or a conference of IATA is unable to agree on a rate, or

(2) at any time no IATA machinery is applicable, or

(3) if either Contracting Party at any time withdraws or fails to renew its approval of that part of the IATA traffic conference machinery relevant to this Section.

(f) In the event that power is conferred by law upon the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States, each of the Contracting Parties shall thereafter exercise its authority in such manner as to prevent any rate or rates proposed by one of its carriers for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party from becoming effective, if in the judgment of the aeronautical authorities of the Contracting Party whose air carrier or carriers is or are proposing such rate, that rate is unfair or uneconomic.

If one of the Contracting Parties on receipt of the notification referred to in paragraph (d) above is dissatisfied with the rate proposed by the air carrier or carriers of the other Contracting Party, it shall so notify the other Contracting Party prior to the expiry of the first fifteen of the thirty days referred to, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate.

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In the event that such agreement is reached, each Contracting Party will exercise its statutory powers to give effect to such agreement.

If agreement has not been reached at the end of the thirty day period referred to in paragraph (d) above, the proposed rate may, unless the aeronautical authorities of the country of the air carrier concerned see fit to suspend its application, go into effect provisionally pending the settlement of any dispute in accordance with the procedure outlined in paragraph (h) below.

(g) Prior to the time when such power may be conferred by law upon the aeronautical authorities of the United States, if one of the Contracting Parties is dissatisfied, with any rate proposed by the air carrier or carriers of either Contracting Party for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party, it shall so notify the other prior to the expiry of the first fifteen of the thirty day period referred to in paragraph (d) above, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate.

In the event that such agreement is reached each Contracting Party will use its best efforts to cause such agreed rate to be put into effect by its air carrier or carriers.

It is recognised that if no such agreement can be reached prior to the expiry of such thirty days, the Contracting Party raising the objection to the rate may take such steps as it may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of.

(h) When in any case under paragraphs (f) and (g) above the aeronautical authorities of the two Contracting Parties cannot agree within a reasonable time upon the appropriate rate after consultation initiated by the complaint of one Contracting Party concerning the proposed rate or an existing rate of the air carrier or carriers of the other Contracting Party, upon the request of either, both Contracting Parties shall submit the question to the Provisional International Civil Aviation Organization or to its successor for an advisory report, and each Party will use its best efforts under the powers available to it to put the opinion [11] expressed in such report.

Section VI

(a) For the purpose of the present Section, the term "transshipment" shall mean the transportation by the same carrier of traffic beyond a certain point on a given route by different aircraft from those employed on the earlier stages of the same route.

(b) Transshipment when justified by economy of operation will be permitted at all points mentioned in the attached Schedules in territory of the two Contracting Parties.

[11] By an exchange of notes dated Feb. 19 and Mar. 10, 1947, between the American Embassy at Paris and the French Ministry of Foreign Affairs it was agreed that the words "into effect" were omitted inadvertently and that "put the opinion" should read "put into effect the opinion".

(c) However, no transshipments will be made in the territory of either Contracting Party which would alter the long range characteristics of the operation or which would be inconsistent with the standards set forth in this Agreement and its Annex and particularly Section IV of this Annex.

Section VII

Changes made by either Contracting Party in the routes described in the Schedules attached except those which change the points served by these airlines in the territory of the other Contracting Party shall not be considered as modifications of the Annex. The aeronautical authorities of either Contracting Party may therefore proceed unilaterally to make such changes, provided, however, that notice of any change is given without delay to the aeronautical authorities of the other Contracting Party.

If such other aeronautical authorities find that, having regard to the principles set forth in Section IV of the present Annex, interests of their air carrier or carriers are prejudiced by the carriage by the air carrier or carriers of the first Contracting Party of traffic between the territory of the second Contracting Party and the new point in the territory of a third country, the authorities of the two Contracting Parties shall consult with a view to arriving at a satisfactory agreement.

Section VIII

After the present Agreement comes into force, the aeronautical authorities of both Contracting Parties will exchange information as promptly as possible concerning the authorizations extended to their respective designated air carriers to render service to, through and from the territory of the other Contracting Party. This will include copies of current certificates and authorizations for service on the routes which are the subject of this Agreement and, for the future, such new authorizations as may be issued together with amendments, exemption orders and authorized service patterns.

G.B.
J.M.

J.C.
L.W.P.
G.P.B.

SCHEDULE I

Routes To Be Served by the Air Carriers of the French Republic

(Points on any of the routes may, at the option of the air carrier, be omitted on any or all flights.)

1. France via intermediate points over the North Atlantic to Boston, New York and Washington, and also the site of the United Nations Organization; in both directions.

COVINGTON & BURLING

2. France via intermediate points over the North Atlantic and Montreal to Chicago; in both directions.

3. France via intermediate points over the North Atlantic to New York and beyond to Mexico; in both directions.

4. Martinique via Guadeloupe and via intermediate points to Puerto Rico and beyond via the Dominican Republic to Haiti; in both directions.

5. Indo-China via points in China and Hong Kong to Manila; in both directions (provided that this route is subject to the approval of the Government of the Philippine Islands).

Note: For the purposes of the present Schedule, the term "North Atlantic" shall mean that part of the North Atlantic Ocean north of a line from Key West, Florida, to Bermuda, the Azores and Lisbon, including these points.

J.M.
G.B.

J.C.
L.W.P.
G.F.B.

SCHEDULE II

ROUTES TO BE SERVED BY THE AIR CARRIERS OF THE UNITED STATES

(Points on any of the routes may, at the option of the air carrier, be omitted on any or all flights.)

1. The United States via intermediate points over the North Atlantic to Paris and beyond via intermediate points in Switzerland, Italy, Greece, Egypt, the Near East, India, Burma and Siam to Hanoi, and thence to China and beyond; in both directions.

2. The United States via intermediate points over the North Atlantic and Spain to Marseille and beyond via Milan, Budapest and points south of the parallel of Budapest to Turkey and thence via intermediate points to a connection with Route 8 and beyond on said route; in both directions.

3. The United States via intermediate points over the North Atlantic, and Spain to Algiers, Tunis, and beyond via intermediate points to Egypt, and beyond via Route 1; in both directions.

4. The United States via intermediate points to Dakar, Pointe Noire, Brazzaville, and beyond via intermediate points to the Union of South Africa; in both directions.

5. The United States via intermediate points to Guadeloupe, Martinique, and beyond via intermediate points to French Guiana, and beyond in South America; in both directions.

6. The United States via intermediate points in the Pacific Ocean to New Caledonia and beyond on one or more routes to Australasia (including Australia and New Zealand); in both directions.

7. The United States via intermediate points in the Pacific Ocean and Manila to Saigon, and beyond to Singapore and Batavia; in both directions.

8. The United States via intermediate points in the Pacific Ocean, Manila, Hong Kong, Macao, and China to Hanoi and beyond via Siam, Burma to India and beyond; in both directions.

Note 1: For the purposes of the present Schedule, the term "North Atlantic" shall mean that part of the North Atlantic Ocean north of a line from Key West, Florida, to Bermuda, the Azores and Lisbon, including these points.

Note 2: It is understood that the rights granted in respect of Hanoi and Saigon shall be in effect from the date of the present Agreement for a period of one year and automatically renewed thereafter except in the event of denunciation with three months' advance notice at the expiration of any annual period.

J.M.
G.B.

J.C.
L.W.P.
G.P.B.

PROTOCOL OF SIGNATURE

It appeared in the course of negotiations leading up to the conclusion of the Agreement on air services between French territory and the territory of the United States of America signed at Paris today that the representatives of the two Contracting Parties were in agreement on the following points:

1. The air carriers of the two Contracting Parties operating on the routes described in the Annex of said Agreement shall enjoy equal opportunity for the operation of the said routes.

2. To the extent that the carrier or carriers of one of the governments is temporarily unable to take advantage of such opportunities as a result of the war, the situation will be mutually examined by the two governments for the purpose of aiding as soon as possible the said air carrier or carriers to increasingly make their proper contribution to the services contemplated.

3. The airports which were constructed on French territory and financed in whole or part by the Government of the United States and which will be open to international civil traffic will be open to the duly authorized air carriers of the United States who will enjoy thereon, on a non-discriminatory basis, rights of transit and non-traffic stop. They will likewise

enjoy there the commercial rights which may be granted them by the present Agreement or any other agreement now in force or later concluded.

4. In order to give effect to the provisions of Section V (f) of the Annex to the Agreement, the executive branch of the United States Government will use its best efforts to secure legislation empowering the Civil Aeronautical authorities of the United States to fix fair and economic rates for international services and to suspend proposed rates, in the same manner as the Civil Aeronautics Board is qualified to act with respect to air transportation within the United States.

5. It is recognized that the determination of tariffs to be applied by an air carrier of one Contracting Party between the territory of the other Contracting Party and a third country is a complex question, the overall solution of which cannot be sought through consultation between only two countries. It is noted, furthermore, that the method of determining such tariffs is now being studied by the Provisional International Civil Aviation Organization. It is understood under these circumstances:

(a) That, pending the acceptance by both parties of any recommendations which the Provisional International Civil Aviation Organization may make after its study of this matter, such tariffs shall be subject to consideration under the provisions of Section IV (b) of the Annex to the Agreement.

(b) That in case the Provisional International Civil Aviation Organization fails to establish a means of determining such rates satisfactory to both Contracting Parties, the consultation provided for in Article XIII (b) of the Agreement shall be in order.

6. For fifteen months from the signing of these documents, pending the completion of necessary improvements to the airport at Martinique (expected in the first quarter of 1947), it is understood that the French Transatlantic service to Martinique will have its temporary terminus at Puerto Rico. During this period, the French air carrier shall have at Puerto Rico the right of commercial entry and departure for international traffic in passengers, cargo and mail on the above service.

7. It is understood that the United States air carrier or air carriers operating on the route listed in Schedule II as Route No. 4 will afford reasonable service at Dakar.

J.M.
G.B.
J.C.
L.W.P.
G.P.B.

INTERNATIONAL CIVIL AVIATION

Convention opened for signature at Chicago December 7, 1944, and signed for the United States December 7, 1944
Senate advice and consent to ratification July 25, 1946
Ratified by the President of the United States August 6, 1946
Ratification of the United States deposited at Washington August 9, 1946
Proclaimed by the President of the United States March 17, 1947
Entered into force April 4, 1947
Amended by protocols of May 27, 1947,[1] June 14, 1954 (frequency of Assembly sessions),[2] June 14, 1954 (permanent seat of Organization),[3] and June 21, 1961,[4] as between contracting parties to the protocols[5]
Protocol on authentic trilingual text of convention and procès-verbal of rectification of protocol done at Buenos Aires September 24, 1968[6]

61 Stat. 1180; Treaties and Other International Acts Series 1591

CONVENTION ON INTERNATIONAL CIVIL AVIATION

PREAMBLE

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.

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[1] S. Ex. GG, 80th Cong., 1st sess. The United States did not become a party.
[2] 8 UST 179; TIAS 3756.
[3] 320 UNTS 209. The United States did not become a party.
[4] 13 UST 2105; TIAS 5170.
[5] An amendatory protocol of Sept. 15, 1962, with respect to which the United States deposited an instrument of ratification, had not entered into force as of July 1, 1969; for text, see S. Ex. D, 88th Cong., 1st sess.
[6] 19 UST 7693; TIAS 6605 and TIAS 6681.

PART I. AIR NAVIGATION

CHAPTER I

General Principles and Application of the Convention

Article 1

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

Article 3

(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

(c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

Article 4

Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.

CHAPTER II

Flight Over Territory of Contracting States

Article 5

Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.

Article 6

No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Article 7

Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State.

Article 8

No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

Article 9

(a) Each contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization.

(b) Each contracting State reserves also the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the

whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States.

(c) Each contracting State, under such regulations as it may prescribe, may require any aircraft entering the areas contemplated in subparagraphs (a) or (b) above to effect a landing as soon as practicable thereafter at some designated airport within its territory.

Article 10

Except in a case where, under the terms of this Convention or a special authorization, aircraft are permitted to cross the territory of a contracting State without landing, every aircraft which enters the territory of a contracting State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination. On departure from the territory of a contracting State, such aircraft shall depart from a similarly designated customs airport. Particulars of all designated customs airports shall be published by the State and transmitted to the International Civil Aviation Organization established under Part II of this Convention for communication to all other contracting States.

Article 11

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

Article 12

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

Article 13

The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such

as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

Article 14

Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties.

Article 15

Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation.

Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(a) As to aircraft not engaged in scheduled international air services, than those that would be paid by its national aircraft of the same class engaged in similar operations, and

(b) As to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the International Civil Aviation Organization: provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.

Article 16

The appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention.

CHAPTER III

Nationality of Aircraft

Article 17

Aircraft have the nationality of the State in which they are registered.

Article 18

An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

Article 19

The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.

Article 20

Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.

Article 21

Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State. In addition, each contracting State shall furnish reports to the International Civil Aviation Organization, under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that State and habitually engaged in international air navigation. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting States.

CHAPTER IV

Measures To Facilitate Air Navigation

Article 22

Each contracting State agrees to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially

in the administration of the laws relating to immigration, quarantine, customs and clearance.

Article 23

Each contracting State undertakes, so far as it may find practicable, to establish customs and immigration procedures affecting international air navigation in accordance with the practices which may be established or recommended from time to time, pursuant to this Convention. Nothing in this Convention shall be construed as preventing the establishment of customs-free airports.

Article 24

(a) Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. This exemption shall not apply to any quantities or articles unloaded, except in accordance with the customs regulations of the State, which may require that they shall be kept under customs supervision.

(b) Spare parts and equipment imported into the territory of a contracting State for incorporation in or use on an aircraft of another contracting State engaged in international air navigation shall be admitted free of customs duty, subject to compliance with the regulations of the State concerned, which may provide that the articles shall be kept under customs supervision and control.

Article 25

Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. Each contracting State, when undertaking search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this Convention.

Article 26

In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit,

with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State.

Article 27

(a) While engaged in international air navigation, any authorized entry of aircraft of a contracting State into the territory of another contracting State or authorized transit across the territory of such State with or without landings shall not entail any seizure or detention of the aircraft or any claim against the owner or operator thereof or any other interference therewith by or on behalf of such State or any person therein, on the ground that the construction, mechanism, parts, accessories or operation of the aircraft is an infringement of any patent, design, or model duly granted or registered in the State whose territory is entered by the aircraft, it being agreed that no deposit of security in connection with the foregoing exemption from seizure or detention of the aircraft shall in any case be required in the State entered by such aircraft.

(b) The provisions of paragraph (a) of this Article shall also be applicable to the storage of spare parts and spare equipment for the aircraft and the right to use and install the same in the repair of an aircraft of a contracting State in the territory of any other contracting State, provided that any patented part or equipment so stored shall not be sold or distributed internally in or exported commercially from the contracting State entered by the aircraft.

(c) The benefits of this Article shall apply only to such States, parties to this Convention, as either (1) are parties to the International Convention for the Protection of Industrial Property and to any amendments thereof; or (2) have enacted patent laws which recognize and give adequate protection to inventions made by the nationals of the other States parties to this Convention.

Article 28

Each contracting State undertakes, so far as it may find practicable, to:

(a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;

(b) Adopt and put into operation the appropriate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention;

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(e) Collaborate in international measures to secure the publication of aeronautical maps and charts in accordance with standards which may be recommended or established from time to time, pursuant to this Convention.

Chapter V

Conditions To Be Fulfilled With Respect to Aircraft

Article 29

Every aircraft of a contracting State, engaged in international navigation, shall carry the following documents in conformity with the conditions prescribed in this Convention:

(a) Its certificate of registration;
(b) Its certificate of airworthiness;
(c) The appropriate licenses for each member of the crew;
(d) Its journey log book;
(e) If it is equipped with radio apparatus, the aircraft radio station license;
(f) If it carries passengers, a list of their names and places of embarkation and destination;
(g) If it carries cargo, a manifest and detailed declarations of the cargo.

Article 30

(a) Aircraft of each contracting State may, in or over the territory of other contracting States, carry radio transmitting apparatus only if a license to install and operate such apparatus has been issued by the appropriate authorities of the State in which the aircraft is registered. The use of radio transmitting apparatus in the territory of the contracting State whose territory is flown over shall be in accordance with the regulations prescribed by that State.

(b) Radio transmitting apparatus may be used only by members of the flight crew who are provided with a special license for the purpose, issued by the appropriate authorities of the State in which the aircraft is registered.

Article 31

Every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered.

Article 32

(a) The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.

(b) Each contracting State reserves the right to refuse to recognize, for

the purpose of flight above its own territory, certificates of competency and licenses granted to any of its nationals by another contracting State.

Article 33

Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

Article 34

There shall be maintained in respect of every aircraft engaged in international navigation a journey log book in which shall be entered particulars of the aircraft, its crew and of each journey, in such form as may be prescribed from time to time pursuant to this Convention.

Article 35

(a) No munitions of war or implements of war may be carried in or above the territory of a State in aircraft engaged in international navigation, except by permission of such State. Each State shall determine by regulations what constitutes munitions of war or implements of war for the purposes of this Article, giving due consideration, for the purposes of uniformity, to such recommendations as the International Civil Aviation Organization may from time to time make.

(b) Each contracting State reserves the right, for reasons of public order and safety, to regulate or prohibit the carriage in or above its territory of articles other than those enumerated in paragraph (a): provided that no distinction is made in this respect between its national aircraft engaged in international navigation and the aircraft of the other States so engaged; and provided further that no restriction shall be imposed which may interfere with the carriage and use on aircraft of apparatus necessary for the operation or navigation of the aircraft or the safety of the personnel or passengers.

Article 36

Each contracting State may prohibit or regulate the use of photographic apparatus in aircraft over its territory.

CHAPTER VI

International Standards and Recommended Practices

Article 37

Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and

organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:

(a) Communications systems and air navigation aids, including ground marking;
(b) Characteristics of airports and landing areas;
(c) Rules of the air and air traffic control practices;
(d) Licensing of operating and mechanical personnel;
(e) Airworthiness of aircraft;
(f) Registration and identification of aircraft;
(g) Collection and exchange of meteorological information;
(h) Log books;
(i) Aeronautical maps and charts;
(j) Customs and immigration procedures;
(k) Aircraft in distress and investigation of accidents;

and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.

Article 38

Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.

Article 39

(a) Any aircraft or part thereof with respect to which there exists an international standard of airworthiness or performance, and which failed in any respect to satisfy that standard at the time of its certification, shall have

endorsed on or attached to its airworthiness certificate a complete enumeration of the details in respect of which it so failed.

(b) Any person holding a license who does not satisfy in full the conditions laid down in the international standard relating to the class of license or certificate which he holds shall have endorsed on or attached to his license a complete enumeration of the particulars in which he does not satisfy such conditions.

Article 40

No aircraft or personnel having certificates or licenses so endorsed shall participate in international navigation, except with the permission of the State or States whose territory is entered. The registration or use of any such aircraft, or of any certificated aircraft part, in any State other than that in which it was originally certificated shall be at the discretion of the State into which the aircraft or part is imported.

Article 41

The provisions of this Chapter shall not apply to aircraft and aircraft equipment of types of which the prototype is submitted to the appropriate national authorities for certification prior to a date three years after the date of adoption of an international standard of airworthiness for such equipment.

Article 42

The provisions of this Chapter shall not apply to personnel whose licenses are originally issued prior to a date one year after initial adoption of an international standard of qualification for such personnel; but they shall in any case apply to all personnel whose licenses remain valid five years after the date of adoption of such standard.

PART II. THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

CHAPTER VII

The Organization

Article 43

An organization to be named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.

Article 44

The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

(a) Insure the safe and orderly growth of international civil aviation throughout the world;

(b) Encourage the arts of aircraft design and operation for peaceful purposes;

(c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;

(d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

(e) Prevent economic waste caused by unreasonable competition;

(f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;

(g) Avoid discrimination between contracting States;

(h) Promote safety of flight in international air navigation;

(i) Promote generally the development of all aspects of international civil aeronautics.

Article 45

The permanent seat of the Organization shall be at such place as shall be determined at the final meeting of the Interim Assembly of the Provisional International Civil Aviation Organization set up by the Interim Agreement on International Civil Aviation signed at Chicago on December 7, 1944.[7] The seat may be temporarily transferred elsewhere by decision of the Council.

Article 46

The first meeting of the Assembly shall be summoned by the Interim Council of the above-mentioned Provisional Organization as soon as the Convention has come into force, to meet at a time and place to be decided by the Interim Council.

Article 47

The Organization shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned.

CHAPTER VIII

The Assembly

Article 48[8]

(a) The Assembly shall meet annually and shall be convened by the Council at a suitable time and place. Extraordinary meetings of the Assembly may

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[7] EAS 469, *ante*, p. 929.

[8] For a protocol amending arts. 48 and 49, see 8 UST 179; TIAS 3756. For a protocol amending art. 50, see 13 UST 2105; TIAS 5170.

be held at any time upon the call of the Council or at the request of any ten contracting States addressed to the Secretary General.

(b) All contracting States shall have an equal right to be represented at the meetings of the Assembly and each contracting State shall be entitled to one vote. Delegates representing contracting States may be assisted by technical advisers who may participate in the meetings but shall have no vote.

(c) A majority of the contracting States is required to constitute a quorum for the meetings of the Assembly. Unless otherwise provided in this Convention, decisions of the Assembly shall be taken by a majority of the votes cast.

Article 49 [8]

The powers and duties of the Assembly shall be to:

(a) Elect at each meeting its President and other officers;

(b) Elect the contracting States to be represented on the Council, in accordance with the provisions of Chapter IX;

(c) Examine and take appropriate action on the reports of the Council and decide on any matter referred to it by the Council;

(d) Determine its own rules of procedure and establish such subsidiary commissions as it may consider to be necessary or desirable;

(e) Vote an annual budget and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII;

(f) Review expenditures and approve the accounts of the Organization;

(g) Refer, at its discretion, to the Council, to subsidiary commissions, or to any other body any matter within its sphere of action;

(h) Delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time;

(i) Carry out the appropriate provisions of Chapter XIII;

(j) Consider proposals for the modification or amendment of the provisions of this Convention and, if it approves of the proposals, recommend them to the contracting States in accordance with the provisions of Chapter XXI;

(k) Deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.

CHAPTER IX

The Council

Article 50 [8]

(a) The Council shall be a permanent body responsible to the Assembly. It shall be composed of twenty-one contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years, and the members of the Council so elected shall hold office until the next following election.

(b) In electing the members of the Council, the Assembly shall give adequate representation to (1) the States of chief importance in air transport; (2) the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation; and (3) the States not otherwise included whose designation will insure that all the major geographic areas of the world are represented on the Council. Any vacancy on the Council shall be filled by the Assembly as soon as possible; any contracting State so elected to the Council shall hold office for the unexpired portion of its predecessor's term of office.

(c) No representative of a contracting State on the Council shall be actively associated with the operation of an international air service or financially interested in such a service.

Article 51

The Council shall elect its President for a term of three years. He may be reelected. He shall have no vote. The Council shall elect from among its members one or more Vice Presidents who shall retain their right to vote when serving as acting President. The President need not be selected from among the representatives of the members of the Council but, if a representative is elected, his seat shall be deemed vacant and it shall be filled by the State which he represented. The duties of the President shall be to:

(a) Convene meetings of the Council, the Air Transport Committee, and the Air Navigation Commission;

(b) Serve as representative of the Council; and

(c) Carry out on behalf of the Council the functions which the Council assigns to him.

Article 52

Decisions by the Council shall require approval by a majority of its members. The Council may delegate authority with respect to any particular matter to a committee of its members. Decisions of any committee of the Council may be appealed to the Council by any interested contracting State.

Article 53

Any contracting State may participate, without a vote, in the consideration by the Council and by its committees and commissions of any question which especially affects its interests. No member of the Council shall vote in the consideration by the Council of a dispute to which it is a party.

Article 54

The Council shall:

(a) Submit annual reports to the Assembly;

(b) Carry out the directions of the Assembly and discharge the duties and obligations which are laid on it by this Convention;

(c) Determine its organization and rules of procedure;

(d) Appoint and define the duties of an Air Transport Committee, which shall be chosen from among the representatives of the members of the Council, and which shall be responsible to it;

(e) Establish an Air Navigation Commission, in accordance with the provisions of Chapter X;

(f) Administer the finances of the Organization in accordance with the provisions of Chapters XII and XV;

(g) Determine the emoluments of the President of the Council;

(h) Appoint a chief executive officer who shall be called the Secretary General, and make provision for the appointment of such other personnel as may be necessary, in accordance with the provisions of Chapter XI;

(i) Request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds;

(j) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council;

(k) Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction;

(l) Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken;

(m) Consider recommendations of the Air Navigation Commission for amendment of the Annexes and take action in accordance with the provisions of Chapter XX;

(n) Consider any matter relating to the Convention which any contracting State refers to it.

Article 55

The Council may:

(a) Where appropriate and as experience may show to be desirable, create subordinate air transport commissions on a regional or other basis and define groups of states or airlines with or through which it may deal to facilitate the carrying out of the aims of this Convention;

(b) Delegate to the Air Navigation Commission duties additional to those set forth in the Convention and revoke or modify such delegations of authority at any time;

(c) Conduct research into all aspects of air transport and air navigation which are of international importance, communicate the results of its re-

search to the contracting States, and facilitate the exchange of information between contracting States on air transport and air navigation matters:

(d) Study any matters affecting the organization and operation of international air transport, including the international ownership and operation of international air services on trunk routes, and submit to the Assembly plans in relation thereto;

(e) Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable.

CHAPTER X

The Air Navigation Commission

Article 56

The Air Navigation Commission shall be composed of twelve members appointed by the Council from among persons nominated by contracting States. These persons shall have suitable qualifications and experience in the science and practice of aeronautics. The Council shall request all contracting States to submit nominations. The President of the Air Navigation Commission shall be appointed by the Council.

Article 57

The Air Navigation Commission shall:

(a) Consider, and recommend to the Council for adoption, modifications of the Annexes to this Convention;

(b) Establish technical subcommissions on which any contracting State may be represented, if it so desires;

(c) Advise the Council concerning the collection and communication to the contracting States of all information which it considers necessary and useful for the advancement of air navigation.

CHAPTER XI

Personnel

Article 58

Subject to any rules laid down by the Assembly and to the provisions of this Convention, the Council shall determine the method of appointment and of termination of appointment, the training, and the salaries, allowances, and conditions of service of the Secretary General and other personnel of the Organization, and may employ or make use of the services of nationals of any contracting State.

Article 59

The President of the Council, the Secretary General, and other personnel shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organization. Each contracting State undertakes fully to respect the international character of the responsibilities of the personnel and not to seek to influence any of its nationals in the discharge of their responsibilities.

Article 60

Each contracting State undertakes, so far as possible under its constitutional procedure, to accord to the President of the Council, the Secretary General, and the other personnel of the Organization, the immunities and privileges which are accorded to corresponding personnel of other public international organizations. If a general international agreement on the immunities and privileges of international civil servants is arrived at, the immunities and privileges accorded to the President, the Secretary General, and the other personnel of the Organization shall be the immunities and privileges accorded under that general international agreement.

CHAPTER XII

Finance

Article 61 *

The Council shall submit to the Assembly an annual budget, annual statements of accounts and estimates of all receipts and expenditures. The Assembly shall vote the budget with whatever modification it sees fit to prescribe, and, with the exception of assessments under Chapter XV to States consenting thereto, shall apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine.

Article 62

The Assembly may suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organization.

Article 63

Each contracting State shall bear the expenses of its own delegation to the Assembly and the remuneration, travel, and other expenses of any person whom it appoints to serve on the Council, and of its nominees or representatives on any subsidiary committees or commissions of the Organization.

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* For a protocol amending art. 61, see 8 UST 179; TIAS 3756.

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Chapter XIII

Other International Arrangements

Article 64

The Organization may, with respect to air matters within its competence directly affecting world security, by vote of the Assembly enter into appropriate arrangements with any general organization set up by the nations of the world to preserve peace.

Article 65

The Council, on behalf of the Organization, may enter into agreements with other international bodies for the maintenance of common services and for common arrangements concerning personnel and, with the approval of the Assembly, may enter into such other arrangements as may facilitate the work of the Organization.

Article 66

(a) The Organization shall also carry out the functions placed upon it by the International Air Services Transit Agreement [10] and by the International Air Transport Agreement [11] drawn up at Chicago on December 7, 1944, in accordance with the terms and conditions therein set forth.

(b) Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement or the International Air Transport Agreement drawn up at Chicago on December 7, 1944 shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreement.

PART III. INTERNATIONAL AIR TRANSPORT

Chapter XIV

Information and Reports

Article 67

Each contracting State undertakes that its international airlines shall, in accordance with requirements laid down by the Council, file with the Council traffic reports, cost statistics and financial statements showing among other things all receipts and the sources thereof.

Chapter XV

Airports and Other Air Navigation Facilities

Article 68

Each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use.

[10] EAS 487, *ante*, p. 916.
[11] EAS 488, *ante*, p. 922.

LIBRARY

Article 69

If the Council is of the opinion that the airports or other air navigation facilities, including radio and meteorological services, of a contracting State are not reasonably adequate for the safe, regular, efficient, and economical operation of international air services, present or contemplated, the Council shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose. No contracting State shall be guilty of an infraction of this Convention if it fails to carry out these recommendations.

Article 70

A contracting State, in the circumstances arising under the provisions of Article 69, may conclude an arrangement with the Council for giving effect to such recommendations. The State may elect to bear all of the costs involved in any such arrangement. If the State does not so elect, the Council may agree, at the request of the State, to provide for all or a portion of the costs.

Article 71

If a contracting State so requests, the Council may agree to provide, man, maintain, and administer any or all of the airports and other air navigation facilities, including radio and meteorological services, required in its territory for the safe, regular, efficient and economical operation of the international air services of the other contracting States, and may specify just and reasonable charges for the use of the facilities provided.

Article 72

Where land is needed for facilities financed in whole or in part by the Council at the request of a contracting State, that State shall either provide the land itself, retaining title if it wishes, or facilitate the use of the land by the Council on just and reasonable terms and in accordance with the laws of the State concerned.

Article 73

Within the limit of the funds which may be made available to it by the Assembly under Chapter XII, the Council may make current expenditures for the purposes of this Chapter from the general funds of the Organization. The Council shall assess the capital funds required for the purposes of this Chapter in previously agreed proportions over a reasonable period of time to the contracting States consenting thereto whose airlines use the facilities. The Council may also assess to States that consent any working funds that are required.

Article 74

When the Council, at the request of a contracting State, advances funds or provides airports or other facilities in whole or in part, the arrangement

may provide, with the consent of that State, for technical assistance in the supervision and operation of the airports and other facilities, and for the payment, from the revenues derived from the operation of the airports and other facilities, of the operating expenses of the airports and the other facilities and of interest and amortization charges.

Article 75

A contracting State may at any time discharge any obligation into which it has entered under Article 70, and take over airports and other facilities which the Council has provided in its territory pursuant to the provisions of Articles 71 and 72, by paying to the Council an amount which in the opinion of the Council is reasonable in the circumstances. If the State considers that the amount fixed by the Council is unreasonable it may appeal to the Assembly against the decision of the Council and the Assembly may confirm or amend the decision of the Council.

Article 76

Funds obtained by the Council through reimbursement under Article 75 and from receipts of interest and amortization payments under Article 74 shall, in the case of advances originally financed by States under Article 73, be returned to the States which were originally assessed in the proportion of their assessments, as determined by the Council.

CHAPTER XVI

Joint Operating Organizations and Pooled Services

Article 77

Nothing in this Convention shall prevent two or more contracting States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Convention, including those relating to the registration of agreements with the Council. The Council shall determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies.

Article 78

The Council may suggest to contracting States concerned that they form joint organizations to operate air services on any routes or in any regions.

Article 79

A State may participate in joint operating organizations or in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole

LIBRARY

discretion of the State concerned, be state-owned or partly state-owned or privately owned.

PART IV. FINAL PROVISIONS

CHAPTER XVII

Other Aeronautical Agreements and Arrangements

Article 80

Each contracting State undertakes, immediately upon the coming into force of this Convention, to give notice of denunciation of the Convention relating to the Regulation of Aerial Navigation signed at Paris on October 13, 1919 [12] or the Convention on Commercial Aviation signed at Habana on February 20, 1928,[13] if it is a party to either. As between contracting States, this Convention supersedes the Conventions of Paris and Habana previously referred to.

Article 81

All aeronautical agreements which are in existence on the coming into force of this Convention, and which are between a contracting State and any other State or between an airline of a contracting State and any other State or the airline of any other State, shall be forthwith registered with the Council.

Article 82

The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. A contracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations. If an airline of any contracting State has entered into any such inconsistent obligations, the State of which it is a national shall use its best efforts to secure their termination forthwith and shall in any event cause them to be terminated as soon as such action can lawfully be taken after the coming into force of this Convention.

Article 83

Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible.

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[12] S. Ex. O, 69th Cong., 1st sess. The United States did not become a party.
[13] TS 840, *ante*, vol. 2, p. 698.

Chapter XVIII

Disputes and Default

Article 84

If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.

Article 85

If any contracting State party to a dispute in which the decision of the Council is under appeal has not accepted the Statute of the Permanent Court of International Justice and the contracting States parties to the dispute cannot agree on the choice of the arbitral tribunal, each of the contracting States parties to the dispute shall name a single arbitrator who shall name an umpire. If either contracting State party to the dispute fails to name an arbitrator within a period of three months from the date of the appeal, an arbitrator shall be named on behalf of that State by the President of the Council from a list of qualified and available persons maintained by the Council. If, within thirty days, the arbitrators cannot agree on an umpire, the President of the Council shall designate an umpire from the list previously referred to. The arbitrators and the umpire shall then jointly constitute an arbitral tribunal. Any arbitral tribunal established under this or the preceding Article shall settle its own procedure and give its decisions by majority vote, provided that the Council may determine procedural questions in the event of any delay which in the opinion of the Council is excessive.

Article 86

Unless the Council decides otherwise, any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal. On any other matter, decisions of the Council shall, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding.

Article 87

Each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council

has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article.

Article 88

The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter.

Chapter XIX

WAR

Article 89

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.

Chapter XX

Annexes

Article 90

(a) The adoption by the Council of the Annexes described in Article 54, subparagraph (l), shall require the vote of two-thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each contracting State. Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council.

(b) The Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto.

Chapter XXI

Ratifications, Adherences, Amendments, and Denunciations

Article 91

(a) This Convention shall be subject to ratification by the signatory States. The instruments of ratification shall be deposited in the archives of the Government of the United States of America, which shall give notice of the date of the deposit to each of the signatory and adhering States.

(b) As soon as this Convention has been ratified or adhered to by twenty-six States it shall come into force between them on the thirtieth day after deposit of the twenty-sixth instrument. It shall come into force for each

State ratifying thereafter on the thirtieth day after the deposit of its instrument of ratification.

(c) It shall be the duty of the Government of the United States of America to notify the government of each of the signatory and adhering States of the date on which this Convention comes into force.

Article 92

(a) This Convention shall be open for adherence by members of the United Nations and States associated with them, and States which remained neutral during the present world conflict.

(b) Adherence shall be effected by a notification addressed to the Government of the United States of America and shall take effect as from the thirtieth day from the receipt of the notification by the Government of the United States of America, which shall notify all the contracting States.

Article 93

States other than those provided for in Articles 91 and 92(a) may, subject to approval by any general international organization set up by the nations of the world to preserve peace, be admitted to participation in this Convention by means of a four-fifths vote of the Assembly and on such conditions as the Assembly may prescribe: provided that in each case the assent of any State invaded or attacked during the present war by the State seeking admission shall be necessary.

Article 94

(a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.

(b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention.

Article 95

(a) Any contracting State may give notice of denunciation of this Convention three years after its coming into effect by notification addressed to the Government of the United States of America, which shall at once inform each of the contracting States.

(b) Denunciation shall take effect one year from the date of the receipt of the notification and shall operate only as regards the State effecting the denunciation.

CHAPTER XXII

Definitions

Article 96

For the purpose of this Convention the expression:

(a) "Air service" means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

(b) "International air service" means an air service which passes through the air space over the territory of more than one State.

(c) "Airline" means any air transport enterprise offering or operating an international air service.

(d) "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, cargo or mail.

Signature of Convention

In witness whereof, the undersigned plenipotentiaries, having been duly authorized, sign this Convention on behalf of their respective governments on the dates appearing opposite their signatures.[14]

Done at Chicago the seventh day of December 1944, in the English language. A text drawn up in the English, French, and Spanish languages, each of which shall be of equal authenticity, shall be open for signature at Washington, D.C. Both texts shall be deposited in the archives of the Government of the United States of America, and certified copies shall be transmitted by that Government to the governments of all the States which may sign or adhere to this Convention.

For Afghanistan:
A. HOSAYN AZIZ

For the Government of the Commonwealth of Australia:
ARTHUR S. DRAKEFORD

For Belgium:

For Bolivia:
TOMÁS ALI PACHECO

For Brazil:

For Canada:
H. J. SYMINGTON

For Chile:
R. SAÉNZ
C. BISQUERT
R. MAGALLANES B.

For China:
CHANG KIA-NGAU

For Colombia:

For Costa Rica:

For Cuba:

For Czechoslovakia:

For the Dominican Republic:
C. A. MCLAUGHLIN

For Ecuador:
J. A. CORREA
FRANCISCO GOMEZ JURADO

For Egypt:
M. HASSAN
M. ROUSHDY
M. A. KHALIFA

[14] All signatures printed here were affixed on the opening day, Dec. 7, 1944; dates appear opposite signatures affixed thereafter.

For El Salvador:

For Ethiopia:

For France:
M. Hymans
C. Lenel
Bourges
P. Locussol

For Greece:
D. T. Noti Botzaris
A. J. Argyropoulos

For Guatemala:

For Haiti:
G. Edouard Roy

For Honduras:
E. P. Lefevre

For Iceland:
Thor Thors

For India:
C. V. Bewoor

For Iran:
M. Shayestem

For Iraq:
Ali Jawdat

For Ireland:
Robt. Brennan
John Leydon
John J. Hearne
T. J. O'Driscoll

For Lebanon:
C. Chamoun
F. El-Hoss

For Liberia:
Walter F. Walker

For Luxembourg:

For Mexico:
Pedro A. Chapa

For the Netherlands:
Copes
F. C. Aronstein

For the Government of New Zealand:
Daniel Giles Sullivan

For Nicaragua:
R. E. Frizell

For Norway:

For Panama:

The Delegation of the Republic of Panama signs this Convention *ad referendum*, and subject to the following reservations:

1. Because of its strategic position and responsibility in the protection of the means of communication in its territory, which are of the utmost importance to world trade, and vital to the defense of the Western Hemisphere, the Republic of Panama reserves the right to take, with respect to all flights through the air space above its territory, all measures which in its judgment may be proper for its own security or the protection of said means of communication.

2. The Republic of Panama understands that the technical annexes to which reference is made in the Convention constitute recommendations only, and not binding obligations.

For Paraguay:

For Peru:
A. Revoredo
J. S. Koechlin
Luis Alvarado
F. Elguera
Gilmo van Oordt León

For the Philippine Commonwealth:
J. Hernandez
Urbano A. Zafra
J. H. Foley

For Poland:
Zbyslaw Ciolkosz
Dr. H. J. Gorecki
Stefan J. Konorski
Witold A. Urbanowicz
Ludwik H. Gottlieb

For Portugal:
Mário de Figueiredo
Alfredo Delesque dos Santos Cintra
Duarte Calheiros
Vasco Vieira Garin

For Spain:
E. Terradas
Germán Baraibar

For Sweden:
R. Kumlin

For Switzerland:

For Syria:
N. Kahale

For Turkey:
S. Kocak
F. Sahinbas
Orhan H. Erol

For the Union of South Africa:

For the Government of the United Kingdom of Great Britain and Northern Ireland:
Swinton

For the United States of America:
Adolf A. Berle Jr.
Alfred L. Bulwinkle
Chas. A. Wolverton
F. La Guardia
Edward Warner
L. Welch Pogue
William A. M. Burden

For Uruguay:
Capt. Carbajal
Col. Medardo R. Farias

For Venezuela:

For Yugoslavia:

For Denmark:
Henrik Kauffmann

For Thailand:
M. R. Seni Pramoj

[The convention was signed for Belgium on April 9, 1945; for Brazil on May 29, 1945; for Colombia on October 31, 1947; for Costa Rica on March 10, 1945; for Cuba on April 20, 1945; for Czechoslovakia on April 10, 1945; for El Salvador on May 9, 1945; for Ethiopia on February 10, 1947; for Guatemala on January 30, 1945; for Luxembourg on July 9, 1945; for Mexico on January 30, 1945; for Paraguay on July 27, 1945; for South Africa on June 4, 1945; for Switzerland on July 6, 1945; and for Yugoslavia on January 6, 1954.]

APPENDIX I

United States District Court

SOUTHERN DISTRICT OF NEW YORK

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, *et al.*,

Defendants.

APPENDIX TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PATRICK J. FALVEY
General Counsel,
Port Authority of New York and New Jersey
1 World Trade Center
New York, New York 10048
(212) 466-7698

Attorney for Port Authority Defendants

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Appendix A *

Excerpt from Senate Report No. 1353, 90th Congress, Second Session (1968)

Relation to Local Government Initiatives

[p. 6]

The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. As indicated earlier in this report, certain actions by State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.

In this regard, we concur in the following views set forth by the Secretary in his letter to the committee of June 22, 1968:

> "The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. American Airlines v. Town of Hempstead, 272 F. Supp. 226 (U.S.D.C., Ed., N.Y., 1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption.

*Renumbered Appendix I-A before the Second Circuit

State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

[p. 7]

Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations."

Of course, the authority of units of local government to control the effects of aircraft noise through the exercise

of land use planning and zoning powers is not diminished by the bill.

Finally, since the flight of aircraft has been preempted by the Federal Government, State and local governments can presently exercise no control over sonic boom. The bill makes no change in this regard.

Appendix B*

FILED
JUL 13 1976
WILLIAM L. WHITTAKER, CLERK

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-75-2279 RFP

NATIONAL AVIATION, a general partnership dba NATIONAL AIR FREIGHT, et al.,

Plaintiffs,

v.

THE CITY OF HAYWARD, CALIFORNIA,

Defendant.

OPINION

This is an action by four related commercial airplane operators who seek to have Hayward City Ordinance 75-023 C.S. declared unconstitutional. That ordinance, enacted on October 14, 1975, pursuant to defendant Hayward's capacity as proprietor of the Hayward Air Terminal, prohibits all aircrafts which exceed a noise level of 75 dBA from landing or taking off from the Hayward Air Terminal between the hours of 11:00 p.m. and 7:00 a.m.[1]

[1] The ordinance provides an exception for emergency flights approved by the Air Terminal Manager or in his absence by his designee. Hayward Municipal Code § 2-6.119(1)(c).

*Renumbered Appendix I-B before the Second Circuit.

Appendix B

On November 3, 1975, this court denied plaintiffs' application for a temporary restraining order. Thereafter, on January 12, 1976, the court heard argument on plaintiffs' motion for a preliminary injunction and defendant's motion to dismiss. At that time, we granted leave to the Air Transport Association of America to file a brief as an amicus curiae and took the foregoing motions under submission pending the filing of the amicus and necessary reply briefs by the parties.[3] Accordingly, these briefs having been submitted, we now turn to the disposition of the motions before us.

I. Preliminary Injunction

This circuit employs two tests for determining whether a party is entitled to a preliminary injunction: "One moving for a preliminary injunction assumes the burden of demonstrating *either* a combination of probable success and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor." *Wm. Inglis & Sons Baking* v. *I.T.T. Con't Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975) *quoting from Charlie's Girls Inc.* v. *Revlon Inc.*, 483 F.2d 953, 954 (2d Cir. 1973) (emphasis added by Ninth Circuit). Since it is clear that the balance of the parties' relative hardships does not tip sharply in plaintiffs' favor, if at all

[3] The Amicus Brief of the Air Transport Association of America was filed February 11, 1976. On March 1, 1976, the Aircraft Owners and Pilots Association petitioned the court for leave to file an amicus brief and on March 2, 1976, filed such a brief with the court. Leave to file such a brief is now hereby granted. Defendants filed a "Reply Memorandum" to Air Transport's Amicus Brief on March 8, 1976, which prompted plaintiffs to file a letter of reply of its own on April 5, 1976. Finally on April 27, 1976, defendants responded to plaintiffs' letter of April 5, 1976.

in their direction,[3] plaintiffs must satisfy the standards of the first test if a preliminary injunction is to issue.

A. *Irreparable Injury*

Plaintiffs National Aviation (dba National Air Freight) and Paramount Air Services Inc. are under contract with Peninsula Air Delivery Inc. to transport and deliver cargo consisting of mail and the latest edition newspapers for morning delivery to various interstate and intrastate destinations. The nature of this contract requires these plaintiffs to operate their aircrafts during the hours of 11:00 p.m. and 7:00 a.m.; and in the past, these plaintiffs have operated such flights from Hayward Airport. However, as a result of Hayward City Ordinance 75-023 C.S., these plaintiffs have been required to shift their operations to other airports, primarily Oakland Airport, thereby allegedly incurring large increases in their costs of operation.

Plaintiff Career Aviation is an FAA approved flight training school and conducts flight training at the Hayward Air Terminal. It is occasionally required to conduct flight training operations between the hours of 11:00 p.m. and 7:00 a.m. Due to the passage of ordinance 75-023 C.S., this plaintiff alleges that it is no longer able to conduct its flight training sessions during those hours. Thus, Career's flight training instruction and aircraft rental and

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[3] Plaintiffs essentially argue that the enactment of Hayward City Ordinance 75-023 C.S. has increased their operating costs and reduced their corporate net worth. *See* § I(A) *infra*. Defendant City of Hayward takes the position that enjoining the enforcement of this ordinance will entail great social costs in the form of noise pollution affecting hundreds of residents living in the vicinity of Hayward Air Terminal, as well as possible financial liability for the city by way of a suit in inverse condemnation. *See Griggs* v. *Allegheny County*, 369 U.S. 84 (1962).

sales are alleged to have been adversely affected in varying degrees, not yet calculable.

Moreover, in addition to these alleged increases in operating expenses, plaintiffs allege to have suffered other damage not readily translatable to dollar amounts. These include reductions to the net worth of these companies (thereby placing them in less favorable positions with their banks and other capital lending institutions), loss of value of their leased property and facilities at the Hayward Air Terminal, decreased and less flexible service capabilities to customers, loss of goodwill, and the potential of criminal prosecution of their pilots and employees should those persons unsuccessfully attempt to comply with the ordinance's noise standards.

Although plaintiffs could probably be compensated for a great deal of this injury by an award of money damages, much of the injury which plaintiffs claim to suffer would be very difficult to calculate precisely so that it is doubtful whether plaintiffs have a fully adequate remedy at law. Even more persuasive on this point is defendant's argument that it is completely immune from damage liability in this case. *See* section II *infra*. Accordingly, we are of the opinion that these plaintiffs have made an adequate showing of the "possibility" that they will be "irreparably injured."[4] *See Charlie's Girls Inc. v. Revlon Inc., supra.* Accordingly, we now turn to an examination of plaintiffs' likelihood of success on the merits.

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[4] Plaintiff Midwest Air Charter claims to be adversely affected by the passage of ordinance 75-023 C.S. because of its intentions, prior to the passage of the ordinance, to utilize the Hayward Air Terminal as an arrival and departure point for some of its interstate flights. These allegations are not sufficient to constitute the requisite degree of irreparable injury required for a preliminary injunction to issue in this party's favor.

B. *The Merits*

Plaintiffs and amicus primarily argue that the Hayward ordinance is unconstitutional because (1) it invades a field preempted by federal law and (2) because it imposes an unconstitutional burden on interstate commerce. In addition, plaintiffs argue that a preliminary injunction should issue because the ordinance is contrary to prior federal agreements. We will consider these arguments seriatim.

1. *Preemption.* Plaintiffs and amicus contend that the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*, as it amends the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, and the regulations promulgated thereunder[6] preempt the area of noise regulation and render the Hayward ordinance unconstitutional. The leading case on this question is *Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624 (1973). *Burbank* involved a city ordinance which imposed a "curfew" that, in the absence of an emergency, prevented

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[6] Basically the Noise Control Act of 1972, "by amending § 611 of the Federal Aviation Act, also involves the Environmental Protection Agency (EPA) [and FAA] in the comprehensive scheme of federal control of the aircraft noise problem." "EPA shall submit to FAA proposed regulations to provide such 'control and abatement of aircraft noise and sonic boom' as EPA determines is 'necessary to protect the public health and welfare.' FAA is directed within 30 days to publish the proposed regulations in a notice of proposed rulemaking. Within 60 days after that publication, FAA is directed to commence a public hearing on the proposed rules . . . [and] within 'a reasonable time after the conclusion of such hearing and after consultation with EPA,' FAA is directed either to prescribe the regulations substantially as submitted by EPA, or prescribe them in modified form, . . ." *Burbank* v. *Lockheed Air Terminal,* 411 U.S. 624, 628-630 (1973).

The regulations that have been promulgated under this authority now appear at 14 C.F.R. Part 36. *See also* note 12 *infra.* In addition, the FAA has adopted rules and regulations which control the flight of aircraft (14 C.F.R. Parts 91, 93, 95 and 97) and which govern the use of navigable airspace (14 C.F.R. Parts 71, 73, 75 and 77).

any pure jet aircraft from taking off from privately owned Hollywood-Burbank Airport between the hours of 11:00 p.m. and 7:00 a.m. Mr. Justice Douglas, writing for a 5-4 majority, conducted a detailed analysis of the aforementioned statutes, their legislative history, and the play of the rationale of *Rice* v. *Santa Fe Elevator Corporation*, 331 U.S. 218 (1947), and concluded that the "pervasive nature of the scheme of federal regulation of aircraft noise" constituted preemption. 411 U.S. at 633.

A critical piece of legislative history upon which the *Burbank* opinion turned consists of a letter by the Secretary of Transportation to the Aviation Subcommittee of the Senate Committee on Commerce addressing the question of whether the Noise Control Act of 1972 [sic] would "to any degree preempt State and local government regulation of aircraft noise and sonic boom." The part of the letter upon which the majority relied read as follows:

> The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of the aircraft. . . . HR 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to conrol aircraft noise by regulating the flight of aircraft. [411 U.S. at 635.]

The letter, however, also expressed the view that

> the proposed legislation [would] not affect the rights of a State or local public agency *as the proprietor of an airport* from issuing regulations or establishing reguirements as to the permissible level of noise which can be created by aircrafts using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise

> considerations so long as such exclusion is nondiscriminatory. [411 U.S. at 635-36 n. 14, and at 649.]
>
> Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and for that purpose to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the states or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations. [411 U.S. at 649 (emphasis added).][6]

Accordingly, the *Burbank* court's finding of preemption was made only with regard to a nonproprietor municipality's attempt to regulate aircraft noise pursuant to its police power. Indeed, in footnote 14 of the majority opinion, Mr. Justice Douglas expressly acknowledges that the court "do[es] not consider here what limits, if any, apply to a municipality as a proprietor." 411 U.S. at 635-36 n. 14. As a result, this court must now attempt to do so. We begin with an examination of the ordinance in question.

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[6] In their report concerning this legislation, the Senate Commerce Committee expressly indicated their concurrence with these views. Sen. Rep. No. 1353, 90th Cong. 2d Sess., 6-7.

Appendix B

Section 2 of the Hayward City Ordinance 75-023 recites that the City of Hayward as the owner, operator, and proprietor of an airport located within its corporate limits, possesses the authority to adopt reasonable rules regulating the use of such airport. Nevertheless, the ordinance appears to greatly resemble a measure that a municipality would pass pursuant to its police power. It was enacted as an amendment to the Municipal Code, by the Hayward City Council, and subjects violators to criminal penalties of six months in jail and/or a $500.00 fine. The ordinance further states that it was passed in order to preserve "the public peace, health, and safety in order to provide relief from noise pollution to occupants of residential property surrounding the Hayward Air Terminal."

Thus, it seems clear that if this ordinance was passed by a state or other local government not the proprietor of the airport, it would run afoul of *Burbank* and would constitute an impermissible exercise of police power in an area preempted by Congress. The question presented here is does the City of Hayward's status as proprietor of the Hayward Air Terminal leave the city free to exercise its police powers without constraint by federal preemption. While at first blush the answer to this question would appear to be "no", at least one court seems to indicate otherwise.

Air Transport Association v. *Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975) involved the constitutionality of Title 4, California Administrative Code, Subchapter 6, §§ 5000-5080.5, which, pursuant to the authority of the Public Utilities Code, §§ 21699-21699.5, set particular noise standards to govern the operation of aircraft at all airports operating under a permit from the California Department of Aeronautics. Specifically, the standards fell into two categories:

(a) CNEL (Community Noise Equivalent Level) Standards, prescribed for continued operation of air-

> ports with monitoring requirements, which focus upon the arrival of a prescribed ultimate maximum noise level and limiting the land uses subjected thereto around airport facilities; and (b) SNEL [sic] (Single Event Noise Exposure Level) prohibitions applied to the inseparable feature of noise generated by an aircraft directly engaged in flight.

389 F. Supp. at 62.

The *Crotti* three-judge court upheld the CNEL standards, but declared the SENEL provisions to be an unlawful exercise of police power. Significantly, in rejecting plaintiff Air Transport Association of America's argument that the federal government had preempted the entire field of airport noise regulation, the court wrote:

> It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative. . . . *That correlating right of proprietorship control is recognized and exempted from judicially declared preemption by footnote 14.* [389 F. Supp. at 63-64 (emphasis added) (footnote omitted).]

Indeed the only regulation promulgated to date by the FAA pursuant to its authority "to prescribe and amend such regulations as [it] may find necessary to provide for the control and abatement of aircraft noise and sonic boom" (49 U.S.C. § 1431(b)(1)) is Part 36 of the Federal Aviation Regulations, 14 C.F.R. § 36.1 *et seq.* But even the FAA in its original preface to Part 36 disclaimed that it was intending to preempt noise control regulation and emphasized that local airport owners have the responsi-

bility for determining the permissible noise levels for aircraft using their airport:

> Compliance with Part 36 is not to be construed as a Federal determination that the aircraft is "acceptable" from a noise standpoint in particular airport environments. Responsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport. The noise limits specified in Part 36 are the technologically practicable and economically reasonable limits of aircraft noise reduction technology at the time of type certification and are not intended to substitute federally determined noise levels for those most restrictive limits determined to be necessary by individual airport proprietors in response to the locally determined desire for quiet and the locally determined need for the benefits of air commerce. [34 Fed. Reg. 18355.][7]

Thus, the import of *Burbank* and the legislative history discussed therein, as well as the nature of the subsequent noise regulations implemented by the FAA, is, as the *Crotti* court stated, that the right of airport proprietorship con-

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[7] In the present regulations promulgated by the FAA, § 36.5 reads as follows:

> § 36.5 Limitation of part
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> Pursuant to 49 U.S.C. 1421(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. *No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of any airport.* (Emphasis added.)

In addition, the FAA specifically requires that in the airplane flight manual for each aircraft certified under Part 36, whether jet or small propeller, that the statement underscored above be furnished near the listed noise levels.

trol is recognized and exempted from preemption. Such an interpretation does, however, overlook the explicit statement of the *Burbank* majority that the court was not considering "what limits, if any, apply to a municipality as a proprietor." 411 U.S. at 635-36 n. 14. Moreover, the *Crotti* court's interpretation of Burbank would produce a result, which plaintiffs strenuously contend would be anomalous; namely, that a municipality that owns an airport would be free to exercise police powers in the field of airport noise regulation which powers, if identically exercised by a different municipality or state, would unlawfully intrude into an area said to have been preempted by Congress.[6]

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[6] Indeed amicus Air Transport Association of America contends that the Hayward ordinance is invalid under the *Crotti* decision's holding that the SENEL standards, at issue there, were preempted. Those standards measured the noise exposure level of a single event, such as an aircraft flyby. Under the statutory scheme that *Crotti* invalidated, the proprietor of an airport was to recommend single event noise exposure level limits appropriate to his airport, which, upon approval, were to be enforced by the county in which the airport was located. 4 Cal. Admin. Code § 5035. Operation of an aircraft in excess of those limits was punishable as a misdemeanor. 4 Cal. Admin. Code § 5055.

Amicus argues that by enacting its own ordinance, Hayward set its own single event limit and instead of recommending it to the state for approval, provided for its own enforcement. In all other respects, amicus contends that the effect of the Hayward ordinance is identical with the SENEL limits enjoined in *Crotti*. Both schemes, for example, subject aircraft operators to criminal penalties for operating in excess of the noise limits in effect.

Amicus notes that Hayward could have proceeded to recommend establishment of a noise limit for approval by the county. In so doing, Hayward would have run afoul of the injunction issued against SENEL enforcement by *Crotti*. Although that injunction only runs to the SENEL procedure, amicus rhetorically questions whether the result should be any different when the city does not seek state approval of the noise limit and attempts to enforce the limit itself? If the city cannot propose a noise limit for criminal enforcement by the county, can it logically adopt a limit to be enforced by its own police power?

Therefore, we cannot merely rely on the *Crotti* court's interpretation of this problem. Rather, we must examine further to see whether Congress or the Supreme Court ever intended such a result.

As indicated previously, Justice Douglas based his finding of preemption on "the pervasive nature of the scheme of federal regulation of aircraft noise." 411 U.S. at 633. More specifically, he wrote:

> The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." 49 U.S.C. § 1431 (d)(3). The interdependence of these factors requires a uniform and exclusive system of federal regulation if the Congressional objectives underlying the Federal Aviation Act are to be fulfilled.
>
> If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that factionalized control of the timing of take-offs and landings would severely limit the flexibility of FAA in controlling traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. [411 U.S. at 638-39 (footnotes omitted).]

Defendant responds affirmatively. It distinguishes *Crotti* on the grounds that the SENEL procedure was neither imposed by a proprietor (but the state) nor was enforced by an owner (but the county). Defendant contends that the logic of amicus' argument makes sense only if one denies the existence of the airport owner exception, which so clearly appears in the legislative history and the case law.

Thus, to allow municipal airport proprietors to restrict the use of their facilities by imposing jet curfews or other noise regulations would certainly undermine the rationale underlying Justice Douglas' finding of preemption. This is particularly so in light of the fact that most of the airports in this country are owned by the municipalities in which they are located.

However, the majority was well aware of this fact, as well as of the clear Congressional intention that airport proprietors continue to be permitted to deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion was nondiscriminatory. See 411 U.S. at 635 n. 14.[9] The rationale underlying this special treatment for airport proprietors can be traced to another Justice Douglas opinion—*Griggs* v. *Allegheny County,* 369 U.S. 84 (1962).

Griggs held that an airport operator is financially responsible to nearby property owners for property damage resulting from aircraft noise from overflying commercial flights. The court held that such noise constituted a "taking" of an "air easement" over the property of the plaintiff. The court viewed the county's obligation to obtain air easements as just another part of its responsibility to acquire sufficient land for the airport pursuant to its power of eminent domain. Significantly, the court rejected the contention that it was the United States government that should be liable for the "taking," having required the airport to have been constructed according to federal requirements and having guaranteed through the Federal Aviation Act a "public right of freedom of transit in air commerce through navigable airspace." *See* 369 U.S. at 93-94 (Black, J. dissenting).

Thus, this court finds itself caught on the horns of a particularly sharp dilemma: If on one hand, we follow

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[9] See also, 411 U.S. at 651-652 (Rehnquist, J. dissenting).

the dicta in footnote 14 of the *Burbank* opinion, which is intended to comport with the court's holding in *Griggs*, we will severely undercut the rationale of *Burbank's* finding of preemption. If on the other hand, we disregard the proprietor exception as dicta in order to fully effectuate the *Burbank* rationale, we impose upon airport proprietors the responsibility under *Griggs* for obtaining the requisite noise easements, yet deny them the authority to control the level of noise produced at their airports. This is, of course, exactly what the Senate Commerce Committee indicated that the 1972 amendment to section 611 of the Federal Aviation Act was *not* intended to do. *See* Senate Report No. 1353, 90th Cong., 2d Sess. pp. 6-7.

In the opinion of this court, it is ultimately this clear expression of legislative intent which must control our decision, for, to echo the analysis of Justice Douglas, when "Congress legislate[s] in a field which the States have traditionally occupied, . . . [the] powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress. . . ." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, while the Congressional purpose was undoubtedly clear enough to the *Burbank* majority to rule that a municipality's police power regulations regarding aircraft noise at an airport, which it was not the proprietor of, invaded an area exclusively reserved for federal control,[10] this court cannot, in light of the clear Congressional state-

[10] In addition to Justice Douglas' view that the scheme of federal regulation was pervasive, the majority relied upon statements by the Solicitor General and the Senate Commerce Committee to the effect that "as respects 'airspace management' there is preemption" (411 U.S. at 627) and that the proposed legislation "would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the use of the aircraft." (Sen. Rep. No. 1353, 90th Cong., 2d Sess., 6-7).

ment that the amendments to the Federal Aviation Act were not designed to and would not "prevent airport proprietors from excluding any aircraft on the basis of noise considerations,"[11] make the same finding with respect to regulations adopted by municipal airport proprietors. If Justice Douglas' comments regarding the need for an "uniform and exclusive system of federal regulation" prove correct, Congress and the FAA can take the appropriate steps to provide such a regulatory system.[12] However, at the present time, Congress and the FAA do not appear to have preempted the area, and therefore, the City of Hayward, as proprietor of Hayward Air Terminal, cannot be enjoined from enforcing ordinance 75-023 C.S. on preemption grounds.[13] Nor do we think that this ordinance can be enjoined under the "Commerce Clause."

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[11] Sen. Rep. No. 1353, 90th Cong., 2d Sess., 7.

[12] Indeed, we understand that the FAA is presently in the process of studying four potential policy options in this area: (1) Airport proprietor actions unconstrained by FAA; (2) Airport proprietor completely constrained by FAA with a correlated development of a federal airport noise abatement plan; (3) Airport proprietor to establish a noise abatement plan; and (4) Continue the present policy of emphasizing ongoing efforts to reduce aircraft noise at its source through the development of appropriate technology as well as the development of noise abatement procedures. Under this final alternative, "the FAA would neither support nor oppose restrictions placed on the use of an airport to provide noise relief except where the restrictions constituted an undue burden on interstate commerce, or unjust discrimination or interfere with aircraft operating procedures or the management and control of navigable airspace." *See* Department of Transportation Memo, 40 Fed. Reg., Part 132 (July 9, 1975).

[13] There is some discussion in the briefs of striking down only that part of the Hayward ordinance which imposes a criminal penalty upon persons who violate the ordinance. The theory that apparently lies behind this suggestion is that this would more fully effectuate the *Burbank* holding that municipalities are preempted from regulating aircraft noise pursuant to their police powers. While this suggestion has a certain amount of appeal as a compro-

2. *The Commerce Clause.* There is some question as to the exact test that should be used to determine whether

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mise solution to a difficult problem, further reflection militates against its acceptance.

Underlying the *Burbank* court's finding of preemption was Justice Douglas' perception of the need for a uniform and exclusive system of federal aircraft noise regulation. 411 U.S. at 638-39. Justice Douglas feared the fractionalized control of the timing of takeoffs and landings which might result if a significant number of municipalities enacted noise curfews like that of Burbank's. *Id.* Yet, as is set forth in the body of this opinion, Congress clearly intended that municipal airport proprietors issue regulations and establish requirements as to the permissible level of noise which could be created by aircrafts using the airports. See 411 U.S. 635-36 n. 14. While, as acknowledged previously, giving effect to this Congressional intention, as this court has chosen to do here, will certainly undercut the *Burbank* finding of preemption to some extent; but, declaring that municipal airport proprietors can issue noise regulations, yet not enforce the violation of those regulations with criminal penalties, would do nothing to further effectuate the *Burbank* rationale.

Congress was concerned with *who* could regulate aircraft noise and not with the *manner* in which such regulations were promulgated or enforced. Thus, Congress recognized that municipal airport proprietors (but not other municipalities) were responsible for obtaining noise easements necessary to permit the landing and takeoff of aircrafts, and accordingly intended to preserve the concomitant right of those proprietors to exclude any aircraft on the basis of noise considerations. *See* 411 U.S. at 649.

In the instant case, it appears that Hayward chose to regulate the level of aircraft noise at Hayward Air Terminal by the passage of a city ordinance only because that was the manner in which Hayward regulated all facets of its airports (Hayward Municipal Code § 2-6.51–2-6.150), its parks (§ 2-6.10–2-6.16), its libraries (§ 2-6.02–2-6.05) and all other public facilities. Moreover, the misdemeanor sanction for violation of ordinance 75-023 C.S. appears to have been included solely because any person violating any provision of the Hayward Municipal Code is by its very terms guilty of a misdemeanor. Hayward Municipal Code § 1-3.00.

Under these circumstances, we see no purpose in striking down the criminal penalty provision of Hayward ordinance 75-023 C.S., and thereby forcing the city to enforce its regulations, where necessary, by use of a civil injunction, the violation of which would result in a finding of contempt and in all probability a penalty closely approximating the one presently provided for.

a local legislative enactment's effect on an area of interstate commerce, which has not been preempted by Congressional legislation, is violative of the Commerce Clause. *See Procter and Gamble Company* v. *City of Chicago*, 509 F.2d 69, 75 (7th Cir. 1975). However, it is clear that the first question to be determined is whether there is an effect on interstate commerce for if there is no effect, there is no need for further inquiry. Assuming that there is an effect, the next issue is whether the legislative body "has acted within its province and whether the means of regulation chosen are reasonably adapted to the end sought." *S.C. Highway Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 190 (1938). The inquiry here also focuses on whether the legislative action discriminates against interstate commerce. *Id.* at 189. It is after this point, though, where there appears to be some conflict in the analysis to be used.

There is some support for the proposition that once it is determined that the legislation is a reasonable means of achieving a nondiscriminatory, legitimate goal, it should be deemed constitutional without need for further inquiry. *See Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129 (1968); *S.C. Highway Dep't* v. *Barnwell Bros., supra.* However, the test more frequently employed by the Supreme Court requires that the burden imposed on interstate commerce be further balanced against the local interest supporting the legislation in order to determine the ultimate question of constitutionality. *See, e.g., Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945). The Supreme Court's most recent formulation of this standard appeared in *Pike* v. *Bruce Church Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

> upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Efforts to reconcile these two differing standards usually focus on one of two circumstances which could preclude the need for "balancing." One circumstance present in *Barnwell Bros., supra*, was that the regulation in question was said to be of "peculiarly local concern":

> Ever since *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet 245, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which because of their local character and number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states . . . .
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> . . .
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> . . . Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulations of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions.
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> . . . [R]egulations of the use of highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which Congress not acting, have been sustained even though they may materially interfere with interstate commerce. [313 U.S. at 185, 187-188 (footnotes omitted).]

A second circumstance, at play in *Brotherhood, supra,* involved the propriety of weighing conflicting evidence

regarding the ultimate value of the challenged legislation. The Court said:

> [T]he question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives. The District Court's responsibility for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative judgment constitutes nothing more than . . . "pure speculation."

393 U.S. at 138, 139.[14]

While in the instant case, there is no question regarding the ultimate value or purpose of the Hayward ordinance, proprietary noise control of airports could be said to be a matter of "peculiarly local concern." In *Huron-Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), the Court noted that the problem of air pollution is "peculiarly a matter of state and local concern" and upheld the constitutionality of Detroit's Smoke Abatement Code, finding that it did not discriminate against interstate commerce. There also appears to be ample evidence in the *Burbank* opinion, and the legislative history discussed herein, from which a similar conclusion could be drawn with respect to the control of airport noise. However, we need not decide this issue because in our view the Hayward ordinance could not be invalidated even under the more stringent "balancing" standard.

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[14] *See also S. C. Highway Dep't* v. *Barnwell Bros.,* 303 U.S. at 190-91. *But see Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945).

Appendix B

Plaintiffs argue that the Hayward ordinance burdens interstate commerce by forcing them to make their flights from Oakland Airport rather than Hayward Air Terminal, thereby impairing their ability to deliver the mail and newspapers to customers in California and other nearby states. However, it appears from the record that plaintiffs have had little problem in successfully shifting their operations, where necessary, to the Oakland Airport and that they are still delivering the same newspapers and cargos out of state that they did before the ordinance was enacted.[15] Moreover, there is evidence to indicate that at least some of plaintiffs' planes can comply, and have complied, with the 75 dBA noise level set by the Hayward ordinance.[16] Thus, any effect on interstate commerce produced by the ordinance seems to be incidental at best and clearly not excessive when weighed against the legitimate and concededly laudable goal of controlling the noise levels at the Hayward Air Teminal during late evening and morning hours.[17]

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[15] *See, e.g.*, Affidavit of Peter W. Davis, filed January 8, 1976, pp. A6, A11.

[16] *See* Affidavit of Armin T. Wright filed January 8, 1976; Affidavit of William W. Schofield filed January 8, 1976, pp. A18-A19.

[17] The only evidence that plaintiffs have offered the court regarding the burden on interstate commerce which has been imposed upon them as a result of defendant's ordinance consist of vague and conclusory allegations in three affidavits filed by Messrs. Reese, K. Robinson and R. Robinson. The evidence set forth in these affidavits is accurately summarized in the sixth paragraph of plaintiffs' March 31, 1976, letter to the court:

> [P]laintiffs are regularly engaged in the interstate transportation of perishable cargos, Federal Reserve bank deposits, late edition newspapers and United States mail . . . . The affidavits previously filed herein . . . state the involvement of these plaintiffs in interstate commerce [and] . . . also state that plaintiffs have been adversely affected in their interstate transport of the above items and that their business has declined as a result of this ordinance.

Perhaps recognizing this, the real thrust of plaintiffs and amicus' argument is directed at the potential for conflicting legislation which itself is alleged to constitute an impermissible burden on interstate commerce. The cases, however, on which plaintiffs and amicus rely upon to support this argument all involve instances in which the regulations in question either conflicted with existing federal legislation or regulations, or invaded an area preempted by Congress. *See Lockheed Air Terminal* v. *City of Burbank,* 318 F. Supp. 914 (C.D. Cal. 1970) *aff'd without reaching commerce clause issue,* 457 F.2d 667 (9th Cir. 1972), 411 U.S. 624 (1973); *American Airlines Inc.* v. *City of Audubon Park,* 297 F. Supp. 207 (W.D. Ky. 1968) *aff'd* 407 F.2d 1306 (6th Cir. 1969); *American Airlines Inc.* v. *Town of Hempstead,* 272 F. Supp. 226 (E.D. N.Y. 1967) *aff'd without reaching commerce clause issue,* 393 U.S. 1017 (1969); *All American Airways* v. *Village of Cedarhurst,* 106 F. Supp. 521 (E.D. N.Y. 1952); *aff'd sub nom Allegheny Airlines* v. *Village of Cedarhurst,* 238 F.2d 812 (2d Cir. 1956). Significantly, while the District Court's holding on the commerce clause in *Burbank* was not reached in the affirmances of the Ninth Circuit or the Supreme Court, Mr. Justice Renquist, in a dissenting opinion in which three other members of the court joined, labelled that holding of "questionable validity" noting that "the proper determination of the question turns on an evaluation of the facts of each case, [citing], Bibb v. Navajo Freight Lines, 395 U.S. 520 (1959)." 411 U.S. at 654. Indeed, in *Huron-Portland Cement Co.* v. *City of Detroit, supra,* the Court noted that while appellant had argued that other local governments might impose differing requirements as to air pollution, it had pointed to none, and accordingly rejected appellant's commerce clause argument. *See also Procter and Gamble Co.* v. *City of Chicago, supra,* 500 F.2d at 77.

Appendix B

As in *Huron-Portland Cement,* the record here contains "nothing to suggest the existence of competing or conflicting local regulation." 362 U.S. 449. While plaintiffs point to the fact that Oakland Airport has received a complaint from the City of Alameda regarding excessive noise on runway 15, defendant has submitted the affidavit of Francis H. Witcomb, Manager of the Oakland Metropolitan Airport, which is set forth in relevant part in the margin below,[18] and which indicates that Oakland has no plans to enact an ordinance for the Oakland Airport similar to that of the Hayward ordinance.[19]

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[18] ". . . I recollect that a noise complaint had been received from the city of Alameda concerning noise on the southern tip of the main island of the City of Alameda. I surmised that that noise may have been caused by aircraft using Runway 15-33, although the noise could have been caused by aircraft using Runways 9-27 Right or 9-27 Left, or the noise could have been caused by overflights of aircraft not using the Oakland Airport. Although National Aviation's use of these three Oakland Airport North Field Runways could potentially lead to noise complaints, its use of the South Field Runway 11-29 greatly reduces or eliminates that possibility. National Aviation has, in fact, used Runway 11-29 and its operations have produced no noise complaints.

3. In making this affidavit, I also reviewed the Affidavit of Robert H. Brydon, dated February 26, 1976, and I agree that the operations conducted by National Aviation during the nighttime hours generally between the hours of midnight and 3:00 a.m. did not interfere with the normal use and operation of the Oakland Airport by scheduled air carriers which serve Oakland Airport.

4. At the present time, the Port of Oakland has no plans of which I am aware, for enacting an ordinance for the Oakland Airport similar to the Hayward ordinance which I have reviewed, and which would restrict aircraft operations of the type conducted by National Aviation from the Oakland Airport."

[19] It does not appear that the voluntary jet takeoff ban which Oakland Airport is reported to have instituted with respect to certain of its northern runways affect plaintiffs' aircrafts. Moreover, there is no evidence that this voluntary program will hamper plaintiffs' aircrafts from using that airport's southern runways.

To summarize then, on the record before us there is insufficient evidence from which to conclude that the Hayward ordinance is presently imposing anything but an "incidental" burden on interstate commerce. The possibility that other municipalities will sometime in the future enact similar ordinances, which will together then create an impermissible burden on interstate commerce is mere speculation. Accordingly, this court cannot enjoin enforcement of Hayward ordinance 75-023 C.S. on commerce clause grounds.

3. *Breach of Prior Federal Agreements.* The Hayward Air Terminal was originally an Army Air Corp field that was quit-claimed to the City of Hayward in 1946 with provisions *inter alia* that the airport "shall prevent any land use either within or outside the boundaries of the airport . . . [which would] limit its usefulness as an airport." These requirements have also been periodically restated in agreements for federal funding of projects at the Hayward Air Terminal, such as the Airport and Airway Development Plan grants, *see* 49 U.S.C. §§ 1713-1719, from which Hayward has received substantial amounts of money.

Plaintiffs argue that Hayward ordinance 75-023 C.S. contravenes the provisions in these various federal agreements and that there never would have been any need for the ordinance had Hayward complied with the provisions which require the city to attempt to provide for land use that will be compatible with the airport.

At the outset, we note that there are serious questions as to plaintiffs' standing as third party beneficiaries to raise these claims. *Compare Port of New York Authority* v. *Eastern Air Lines,* 259 F. Supp. 745 (E.D. N.Y. 1966); *City and County of San Francisco* v. *Western Air Lines,* 204 Cal. App. 2d 105, 22 Cal. Rptr. 216 (1st Dist. 1962) *with Miree* v. *United States,* 526 F.2d 679 (5th Cir. 1976);

City of Inglewood v. *City of Los Angeles*, 451 F.2d 948 (9th Cir. 1971). Moreover, there is also a question as to whether, if plaintiffs have standing, they have properly exhausted their administrative remedies. *See City of Inglewood* v. *City of Los Angeles, supra*, 451 F.2d at 956; *Port of New York Authority* v. *Eastern Air Lines, supra*, 259 F. Supp. at 753. However, even assuming that the merits of plaintiffs' claim are properly before the court, we fail to see how enactment of the Hayward ordinance violates any of the agreements relied on by plaintiffs.

Plaintiffs' claim that the City of Hayward failed to adequately provide for compatible land use around its airport is not well taken. It is apparent from the record, that the Hayward ordinance was enacted primarily in response to complaints from residents in nearby San Lorenzo, whose land use Hayward has no ability to control. Moreover, given the competing factors that Hayward had to consider, this court is of the opinion that Hayward has made its airport available for public use on fair and reasonable terms. While there is some evidence to indicate that the ordinance was primarily passed with plaintiffs in mind, this seems to be because it was plaintiffs' planes that were causing most of the noise problems. In any case, it is clear that the ordinance does not unjustly discriminate against the plaintiffs. The only two distinctions which the ordinance makes are that it operates only between the hours of 11:00 p.m. and 7:00 a.m. and that it applies only to airplanes that emit more than 75 dBa of noise in takeoff or landing. The reasons for the former distinction are obvious. The latter distinction was established only after consultation with an expert in the noise field and is based on that expert's apraisal of maximum permissible noise levels that would not disturb sleep. Both distinctions apply to all plane operators in the same manner.

Thus, plaintiffs have also failed to demonstrate a reasonable likelihood that they will prevail on the merits of this claim and, therefore, this court must, and hereby does, deny their motion for a preliminary injunction.

II. Defendant's Motion to Dismiss

Defendants move to dismiss this action for lack of subject matter jurisdiction. Plaintiffs argue that jurisdiction is conferred by virtue of 28 U.S.C. §§ 1331, 1337. Plaintiffs' contention with respect to section 1331 would appear to be correct except that plaintiffs have not alleged that the matter in controversy exceeds the sum or value of $10,000.[20] However, in any case, this court is of the opinion that jurisdiction is proper under 28 U.S.C. § 1337. *See Lockheed Air Terminal Inc.* v. *City of Burbank, supra,* 317 F. Supp. at 194; *Aircraft Owners and Pilots Ass'n* v. *Port Authority of New York,* 305 F. Supp. 93, 103 (E.D. N.Y. 1969). Defendant's argument that the constitutional claims stated by plaintiffs fail at the outset and should be dismissed is best brought before the court by way of motion for summary judgment.

Defendant also moves to dismiss plaintiffs' claim for damages. Defendant argues that while plaintiffs' complaint fails to state the basis on which a claim for damages is grounded, it could only have been brought pursuant to 42 U.S.C. § 1983. Thus, defendant asks this court to dismiss such a claim since the City of Hayward is not a "person" within the meaning of that statute. *See e.g., City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973). Accordingly, to the extent that plaintiffs' complaint does seek to recover damages against defendant City of Hayward under 42 U.S.C. § 1983, that claim is hereby dismissed.

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[20] Plaintiffs are hereby given leave to amend this omission.

Plaintiffs, however, have amended their complaint to include a claim for inverse condemnation against the city. Plaintiffs' theory is that the enactment of the Hayward Ordinance deprived plaintiffs of access to the runways at the Hayward Air Terminal duing certain nighttime hours, thereby substantially decreasing the value of certain long term aviation cite leases which plaintiffs had entered into with the city and pursuant to which plaintiffs had constructed certain fixed base facilities.

As we indicated at the oral argument of these motions this court has serious reservations regarding the validity of this claim. The Hayward ordinance does not regulate any property of the plaintiffs; it only restricts the use of the airport's own runways from noisy aircraft during certain nighttime hours. Moreover, plaintiffs have no absolute right to unrestricted use of the airport's runways at all hours of the day by any type or class of aircraft. Thus, it is highly questionable whether plaintiffs have any right to be compensated for the alleged decrease in value to their leased property when such decrease was caused solely by the defendant's denial of unrestricted access to its airport's runways. *Cf. Colberg* v. *State of California,* 67 Cal. 2d 408, 62 Cal. Rptr. 401, 423 P.2d 3 (1967). Finally, since the ordinance only prevents plaintiffs from using the airport's runways between the hours of 11:00 p.m. and 7:00 a.m., it is clear that plaintiffs' property has not been so substantially deprived of value as to have been unlawfully "taken" within the meaning of the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the California Constitution. *See e.g., South Terminal Corp.* v. *Environmental Protection Agency,* 504 F.2d 646, 678 (1st Cir. 1974); *HFH Ltd.* v. *Superior Court,* 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237 (1975).

Accordingly, defendant's motion to dismiss plaintiffs' inverse condemnation claims is hereby granted.[21]

III. Conclusion

To recapitulate, plaintiffs' motion for a preliminary injunction is denied. Defendant's motion to dismiss for lack of subject matter jurisdiction is denied. Defendant's motion to dismiss plaintiffs' claims for damages under 42 U.S.C. § 1983 is granted as is defendant's motion to dismiss plaintiffs' claim for inverse condemnation.

In addition, the parties are directed to appear before this court on Monday, July 19, 1976, at 3:30 p.m., for a status conference. At that time, we would like to hear from the parties regarding the best means of proceeding with this litigation in light of the views expressed by the court in this opinion.

It Is So Ordered.

Dated: July 13, 1976

Robert F. Peckham
United States District Judge

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[21] This would not, however, preclude plaintiffs from proceeding against the city in state court for breach of contract or promissory estoppel or any other appropriate theory. We, of course, intimate no views as to the merits, if any, of such claims.

Appendix C *

Excerpts taken from the Twelfth Annual Report of the National Advisory Committee for Aeronautics, (1926).

The Air Commerce Act

[p. 9]

The year 1926 will be memorable in aeronautics as marking the year in which Congress enacted the air commerce act. (Public—No. 254—69th Cong.—S. 41.) This act provides the legislative cornerstone for the development of commercial aviation in America. It establishes certain fundamental principles to govern the relation of the Federal Government to the whole problem of aiding the development of commercial aviation in America on a sound basis. The act asserts the doctrine of Federal sovereignty in the air over the lands and waters of the United States to the exclusion of foreign nations. It asserts under the commerce clause of the Constitution the right of the Federal Government to regulate interstate air commerce. It authorizes the designation of airways by the Federal Government and compels adherence to a single set of Federal flying rules on the part of all who use such airways, regardless of whether they are engaged in interstate or intrastate air commerce or private flying. It authorizes Federal lighting systems along airways and the Federal establishment and maintenance of emergency landing fields. It authorizes the transfer of the postal airways, including emergency landing fields, to

[p. 10]

the jurisdiction of the Department of Commerce and the transfer of the postal air ports or terminal facilities to the jurisdiction of the municipalities concerned under arrangements subject to approval by the President. It contemplates the establishment and maintenance of air ports

*Renumbered Appendix I-C before the Second Circuit.

by the municipalities or by private industries. It provides for the compulsory registration of aircraft engaged in interstate commerce and for the optional registration of other aircraft. It provides for the periodic examination and rating of airmen serving in connection with registered aircraft. It provides for the emergency use of existing governmental facilities, extends the application of existing laws to foreign air traffic, and, in short, imposes upon the administrative officer concerned—the Secretary of Commerce—the duty of fostering the development of air commerce in the United States.

Although there had been an almost universal desire among all aeronautical elements in this country for Federal legislation to regulate and encourage commercial aviation, there were conflicting schools of thought on the principles to be followed and the methods to be employed. After the bill had passed both the Senate and House of Representatives and while it was in conference there were differences as to fundamental principles which threatened for a time the enactment of the legislation into law. In this situation Senator Bingham, of Connecticut, the sponsor of the legislation in the Senate and one of the Senate conferees, called upon the National Advisory Committee for Aeronautics on April 15, 1926, for "a full report embodying such constructive criticisms and recommendations as your committee may deem advisable and necessary." At the semiannual meeting of the entire committee, held at Langley Field, Va., on April 22, a special subcommittee on the encouragement and regulation of aircraft in commerce was organized in response to Senator Bingham's letter, as follows:

William F. Durand, chairman.
Joseph S. Ames, Johns Hopkins University.
George K. Burgess, Director Bureau of Standards.
Maj. John F. Curry, United States Army, Chief Engineering Division, McCook Feld.

Capt. Emory S. Land, United States Navy, Bureau of Aeronautics.
Rear Admiral William A. Moffett, United States Navy, Chief, Bureau of Aeronautics, Navy.
Maj. Gen. Mason M. Patrick, United States Army, Chief of Air Service, War Department.
S. W. Stratton, president Massachusetts Institute of Technology.
David W. Taylor, secretary National Advisory Committee for Aeronautics.
Orville Wright.

This special subcommittee considered the air bill carefully and submitted a unanimous report, which was approved by the National Advisory Committee for Aeronautics and transmitted to Senator Bingham on April 23. In its report the subcommittee enumerated a number of changes in important details deemed advisable, but focused its attention primarily on two principles involved which it characterized as "fundamentally unsound and prejudicial alike to the best interests of aviation and to the Government." These were the policies at that time contained in the bill providing for the Federal establishment and operation of airports and for the extension of Federal control to include all air navigation.

Federal Establishment and Operation of Airports

After citing specific provisions of the bill authorizing the Federal establishment and operation of airports, the subcommittee in its report commented on this principle as follows:

> "The policy of the Federal Government regarding airports and the encouragement of air navigation should be analogous to its policy regarding seaports and the encouragement of water navigation. In the

latter field the Government makes charts, establishes and maintains lighthouses, dredges channels, furnishes weather forecasts and storm warnings, and provides for inspection and licensing, but leaves to municipal authorities the control of port facilities. In aid of air navigation the Federal Government should chart airways, establish markers, including lights for night flying, establish and maintain emergency landing fields, furnish weather-report service, and provide for inspection and licensing, but leave to municipal authorities the control of airports.

[p. 11]

Although it is not clearly stated in any one place, the bill does authorize the Secretary of Commerce to purchase, establish, maintain, and operate airports. If this measure should become a law in its present form, the effect would be to destroy the initiative of municipalities in providing their own airports and to bring about demands for large appropriations by Congress for the acquisition by the Secretary of Commerce of land in cities and towns in all parts of the country, and the preparation of such land for use as airports. The financial burden on the Federal Treasury would be so tremendous that it would take a great many years to carry the policy into effect, if, indeed, the responsibility thus assumed would ever be discharged. One result would be certain: Airports would not be established as needed, and the primary object of the bill—the encouragement of commercial aviation—would be defeated. On the other hand, if the municipalities desiring airports are given to understand that they must provide their own airports, the job can be accomplished simultaneously and without delay in all such cities and towns, and the cost involved would fall where it properly belongs.

Appendix C

As to the disposition of the postal airports, after the Post Office Department has placed the air transportation of the mails upon a contract basis and has gone out of the business of operating aircraft, it would be a mistake to transfer these airports to the Secretary of Commerce to be maintained and operated by the Federal Government. This would involve discrimination between the cities that had postal airports and those that had not. It would be the entering wedge for Federal operation of airports. It is considered of great importance as a matter of policy that the Secretary of Commerce should not at any time be engaged in the operation of postal airports, for, if the precedent were to be established, the bad effects might last a long time. The postal airports should be transferred to the municipalities concerned, upon arrangements to be made by the Postmaster General, subject to approval by the President, or if no satisfactory arrangements can be made they should be closed and the properties disposed of as are any other public properties no longer needed by the Federal Government."

The report then recommended specific changes in the bill to carry into effect the views expressed.

Federal Control of All Flying

Under the subject of Federal control of all flying, the subcommittee reported as follows:

"The bill as it passed the Senate provided for Federal control of air navigation used in interstate or foreign commerce. The bill as it passed the House extends Federal control to intrastate commerce and to private flying, interstate and intrastate. This principle involves two major considerations—one of constitutionality, the other of policy. Although it appears to

your committee that private flying can not be construed to constitute "commerce" in the legal sense and that its regulation by the Federal Government can not therefore be justified under the commerce clause of the Constitution, nevertheless your committee does not feel competent to do more than sound a note of warning as to the doubtful constitutionality of this feature of the bill, and will confine itself primarily to the matter of policy involved.

Assuming for the sake of argument that the regulation of intrastate air commerce and of all private flying is constitutional, is it advisable? The primary purpose of the whole bill is, or should be, to encourage commercial aviation, and as an incident to that encouragement to provide reasonable and needful regulations. The regulation of private flying is not necessary at this time to encourage the development of commercial aviation, nor is the regulation of intrastate air commerce necessary to the major purpose of the bill—encouragement of commercial aviation. In the judgment of your committee, the wisest policy to pursue at this time is to provide a maximum of encouragement with a minimum of regulation.

Commercial aviation has not been able to exist in European countries without direct subsidies that amount to from 50 to 95 per cent of the cost of the service rendered the public. Commercial aviation, on a sound commercial basis is nonexistent in Europe. Private flying, due largely to strict and unnecessary governmental regulation, is at a very low ebb in European countries. Although authentic statistics are not available, it is the judgment of your committee that there are in America to-day more privately owned and operated aircraft than in all Europe, and that the reason for this condition is that private flying in Europe has suffered from premature regulation as well as

from overregulation, whereas private flying in America has had complete freedom of development. We believe that the effect of the bill in its present form on private flying in America will be to drive out of the air a major portion of the privately owned aircraft and private flyers, primarily because of the nuisance and inconvenience of unnecessary regulations. It is therefore recommended that the regulatory provisions of the bill be limited to the regulation of aircraft engaged in interstate or foreign commerce.

The subcommittee then proposed changes in the text deemed necessary to accomplish its recommendation in this respect, and in the conclusion of its report said:

> "We are strongly in favor of the enactment of legislation to encourage and regulate commercial aviation. We believe that the objections presented to the principle of Federal establishment of airports and to the principle of Federal regulation of private flying at this time and in the manner proposed in this bill are fundamental, and that it would be better that the bill should fail of enactment than that either of these principles should be retained."

[p. 12]

In transmitting to Senator Bingham the report of the subcommittee, which was signed by each of the 10 members, Doctor Walcott, chairman of the National Advisory Committee for Aeronautics, concurred and invited particular attention to the concluding recommendation as above. The report of the subcommittee was presented to the conferees on the bill and the changes in principles recommended by the committe were accepted, and along with some other minor changes were incorporated into the conference report which was adopted soon after by the Senate and House

of Representatives and the measure was approved by the President and became a law on May 20, 1926.

The act created the position of an additional Assistant Secretary of Commerce specifically to aid in the administration of the Federal air law and in the encouragement of commercial aviation.

Although the air commerce act may not be without fault in some details, it is the opinion of the committee that experience will show that it is sound in principle and that it will prove to be the legislative foundation for the air commerce of the future.

Appendix D *

UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

Regulatory Docket No. 9071

In the matter of the petition of
JORDAN A. DREIFUS

to amend the Federal Aviation Regulations to prescribe aircraft noise regulations for turbojet aircraft operations at the Santa Monica, California Municipal Airport.

Denial of Petition

By letter dated July 19, 1968, and supporting letters dated September 3, 1968, October 1, 1968, January 27, 1969, March 3, 1969, March 6, 1969, March 18, 1969, and May 24, 1969, Jordan A. Dreifus, on his own behalf, petitioned for rule making to amend the Federal Aviation Regulations to prescribe noise restrictions and limitations for turbojet aircraft operating at the Santa Monica Municipal Airport.

In support of his request, petitioner makes the following arguments (here condensed):

(1) Petitioner's residence near the airport is becoming exposed to increasing turbojet aircraft traffic and resulting noise.

(2) Other airport neighbors are suing the airport seeking damages based on aircraft noise.

(3) The FAA has the authority under section 307 of the Federal Aviation Act to issue noise standards governing the flight of aircraft at the airport.

*Renumbered Appendix I-D before the Second Circuit.

(4) New section 611 of the Federal Aviation Act gives the FAA the duty to issue noise standards governing the flight of aircraft at the airport.

(5) New section 611 of the Federal Aviation Act has probably obliterated all State or local authority to issue such regulations.

(6) The exclusive jurisdiction of the FAA in the field of aircraft noise abatement was upheld in the case of *American Airlines, Inc. v. Town of Hempstead*, 272 Fed. Supp. 226 (1966).

(7) Under Agency Order 7110.13, entitled "Aircraft Noise Abatement Programs," the FAA has instituted voluntary noise abatement procedures for airports including runway use restrictions, air traffic control procedures, and routings where compatible with safety.

(8) Failure of the FAA to issue restrictions at Santa Monica and other airports would allow the State and local governments to issue their own airport use restrictions. The restrictions would result in chaos, confusion, interference and obstruction to aircraft operations, which could be contrary to the national interest. The local restrictions could be arbitrary, unreasonable and obscure, and could discriminate against "general aviation" as distinct from interstate commercial carriage or "air transportation." Aside from resulting in litigation, local discrimination against "general aviation" would be contrary to the Federal Aviation Act of 1958.

(9) Failure of the FAA to issue noise abatement regulations for Santa Monica and other airports would be incompatible with the primary reason for the Federal Aviation Act of 1958, which was the uni-

fication of the control of aircraft operations in a single Federal agency to assure safety and the orderly development of aviation.

(10) State and local noise abatement restrictions would not be effective because of the uncertainty with which they would be met by the courts. Petitioner states that a Santa Monica municipal regulation concerning aircraft noise at the airport was recently declared invalid by a State court.

(11) The FAA has the authority to restrict the use of Washington National Airport.

Petitioner supplements the above arguments with noise exposure data developed by a consulting firm, a reference to noise levels specified in FAA Notice of Proposed Rule Making 69-1, the relationship of these figures to a Santa Monica Airport noise report, and newspaper articles concerning the severity of the airport noise problem.

Petitioner makes two basic requests, (1) a general request to issue any aircraft noise regulations "as may be necessary or appropriate in the circumstances" to relieve the noise burden on the neighbors of the Santa Monica Airport, and (2) a specific request to restrict the hours of operation of turbojet aircraft at the airport, as was attempted by the City of Santa Monica in the ordinance that petitioner states was held invalid by the State Court.

With respect to petitioner's first, general request, the FAA has, in fact, implemented Order 7110.13 (cited by petitioner) with respect to the Santa Monica Airport, in cooperation with the City of Santa Monica. This has involved (1) the use of a noise abatement runway when permitted by wind conditions; (2) the use of a noise abatement departure path to avoid congested areas; and (3) the use of raised traffic patterns. In addition, the FAA monitors the conditions at the airport in order to antici-

pate new noise problems, or possible solutions, at the airport. Further, section 91.87 of Part 91 of the Federal Aviation Regulations prescribes noise abatement approach, departure, and runway requirements that must be complied with by turbine-powered and large airplanes. Beyond these rules, and the FAA's monitoring of the Santa Monica Airport under the FAA Order, the FAA believes that further relief from aircraft noise should involve airport use restrictions similar to those that petitioner states were issued in the Santa Monica City Ordinance. In short, the FAA at present does not know of any action, short of the type attempted by Santa Monica, that will satisfy the needs of the neighbors of the airport or supply the relief requested. In light of the above, petitioner's general request for rule making not of the kind atempted by the City of Santa Monica is hereby denied.

In support of petitioner's specific request for time limitations similar to those attempted by the City of Santa Monica, petitioner states that such rules "would avoid a major area of possible dispute with surrounding residents." The FAA agrees that nondiscriminatory time restrictions may be an effective and appropriate means of adapting aircraft noise to the needs of local communities. Petitioner states that the "final question for consideration is: what level of government has the power to so regulate or restrict aircraft operations? and what level of government *should be* the proper level to exercise such power?" With regard to the existence of Federal power to substitute its judgment for that of the local governments who own and operate airports, the FAA agrees with petitioner (see petitioner's arguments 3 and 4 above) that the Federal Aviation Act provides broad powers in the field of aircraft noise abatement.

However, with respect to the question as to which level of government would be the proper one to deny the use of

airports to aircraft on the basis of noise considerations (as would be involved in the requested time limitations), the FAA does not agree with petitioner that new section 611 of the Federal Aviation Act has obliterated the authority of State or local government proprietors of airports (see petitioner's argument 5 above). To the contrary, Senate Report 1353, *Aircraft Noise Abatement,* July 1, 1968, (concerning Public Law 90-411, H.R. 3400, July 21, 1968, which added new section 611 to the Federal Aviation Act of 1958) makes the following statement of Congressional intent concerning the relation of the new legislation to local government initiatives, and in so doing adopts *verbatim* views expressed by the Secretary of Transportation in his letter to the Senate Committee of June 22, 1968 (emphasis supplied):

> The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines* v. *Town of Hempstead,* 272 F. Supp. 266 (U.S.D.C., E.D., N.Y., 1966). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. *State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.*
>
> However, the proposed legislation will not affect the rights of a State or local public agency, *as the pro-*

prietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Just as an airport *owner* is responsible for deciding how long the runways will be, so is the *owner* responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft, and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. *The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.*

The broader policy behind the above quoted letter of June 22, 1968, was earlier stated, in other terms, in the Secretary's letter of March 1, 1968, to the Committee on Interstate and Foreign Commerce of the House of Representatives (emphasis supplied):

> Local communities should, if not inconsistent with overriding national interest, have the option to deter-

> mine the effects of transportation on their environment. . . .
>
> The exercise of this and other authority by local communities should continue. Local communities select airport sites and determine where they best will serve community needs. They bear the responsibility for insuring compatible land use in the airport environs. They have the necessary promotional, proprietary, planning and land use authorities to carry out this responsibility. They have a very influential voice in determining the type of service they want through their appearances in route proceedings before the CAB. *In short, given the limits imposed by aeronautical technology, the community can and should continue to bear a heavy share of the responsibility for assuring the compatibility of the air service they seek and enjoy with the environmental objectives of the community.*

Based on the above guidelines, petitioner's remaining arguments (see above) supporting federally issued time restrictions at the Santa Monica Airport must be answered as follows:

Petitioner's argument 5, stating that new section 611 has probably obliterated all State and local authority to issue such regulations is not correct. While States may not use their police power to regulate in any way the flight of aircraft for noise purposes, State and local governmental proprietors of airports may deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Petitioner's argument 6, implying that the case of *American Airlines, Inc.* v. *Town of Hempstead* requires that the FAA issue time limitations for the Santa Monica airport

is not supportable. While this case stated that noise limiting rules operating as those of the Hempstead ordinance must come from a Federal source, the material quoted from the Senate Report distinguished such ordinances from the action taken, by airport proprietors, to exclude aircraft, using their airports, because of noise considerations. The Hempstead ordinance was not an action taken by an airport proprietor to exclude aircraft from the airport.

Petitioner's argument 8, describing the adverse effects of local airport use restrictions is not supported by any facts or experience known to the FAA. This form of locally responsible noise control is clearly in the national interest in the light of the quoted portion of the Senate Report. Further, there is no indication that the noise restrictions required by petitioner would be discriminatively applied.

Petitioner's argument 9, covering the unification objective of the Federal Aviation Act of 1958, is correct insofar as it describes the need for a single Federal agency in the field of the safe, orderly development of aviation. However, the Senate Report makes it clear that, just as the FAA recognizes the proprietary interest of airport operators by not requiring an airport to accept service, so it should recognize the proprietary interest of airport operators by not substituting its judgment, so far as acceptance of noisy aircraft by the airport is conceived, for that of the State or local governmental elements that own and operate the nation's airports.

Petitioner's argument 10, covering the uncertainty with which State and local noise rules would be met by the courts, must be answered directly from the congressional intent expressed in the Senate Report: any action that would prevent any public airport proprietor from taking any nondiscriminatory action to exclude aircraft on the basis of noise considerations would appear to conflict with

that express congressional intent. In any case, as stated above, the Senate Report states that the Federal Government should not substitute its judgment for that of public airport proprietors on the issue of the service desired by those proprietors and their resulting judgments concerning the locally determined need to accept or exclude aircraft on the basis of noise considerations.

Petitioner's argument 11, concerning FAA authority to restrict operations at Washington National Airport is not valid since the FAA is the proprietor of that airport. Such action by the FAA would not be a substitution of its judgment for that of a state or local governmental proprietor.

Although no FAA regulation concerning the local Santa Monica airport noise problem is appropriate at this time for the reasons mentioned above, it should be noted, as stated in notice 69-1, that the FAA is studying various types of operating rules for obtaining optimum noise levels around airports, and that, where such study indicates that appropriate rules can be developed, they will be issued as a notice of proposed rule making for public comment.

In consideration of the foregoing, I find that the requested rule making under sections 307 and 611 of the Federal Aviation Act would not be in the public interest and that the institution of rule making is not justified. Therefore, in accordance with sections 11.73 and 11.27 of Part 11 of the Federal Aviation Regulations, the petition of Jordan A. Dreifus for rule making under sections 307 and 611 of the Federal Aviation Act, respectively, is hereby denied.

/s/ D. D. Thomas
D. D. Thomas
Acting Administrator

Issued in Washington, D.C. on 10 July, 1969.

Appendix E *

EXCERPTS FROM
CONCORDE SUPERSONIC TRANSPORT AIRCRAFT
FINAL
ENVIRONMENTAL IMPACT STATEMENT
VOLUME 1
SEPTEMBER 1975

[p. I-1]

The National Environmental Policy Act of 1969 (NEPA) requires that, prior to taking a major Federal action which may significantly affect the quality of the human environment, a detailed statement shall be prepared which analyzes the environmental impact of the proposed action. British Airways and Air France have requested an amendment of their air carrier operations specifications under the provisions of Part 129 of the Federal Aviation Regulations. (Appendix A). If approved, the amended operations specifications would permit British Airways and Air France to operate the Concorde Supersonic Transport Aircraft in regular commercial service into and out of John F. Kennedy International Airport in New York (JFK) and Dulles International Airport in Virginia (IAD). The amendment of operations specifications would occur after the issuance of a certificate of airworthiness to the Concorde by the responsible British-French aviation authorities.

Prior to initiation of regular service, it is anticipated that there would be a number of flights by Concorde into and out of JFK and IAD. These route-proving flights are preliminary to and associated with the initiation of

*Renumbered Appendix I-E before the Second Circuit.

commercial service. The total number of route-proving flights expected is approximately 20 to 30. It is not expected that there would be more than two such route-proving flights in any one day at any specific airport.

[p. I-2]

The requests for Federal action that prompted this Environmental Impact Statement (EIS) were the letters of intent to the Federal Aviation Administration (FAA) from the flag carriers of the United Kingdom and the Republic of France (Appendix A). That fact introduces some unique considerations into the decision-making. Specifically, various treaty arrangements exist between these governments and the United States.

The British and French governments informally advised the FAA in the summer of 1974 that their flag carriers contemplated putting the Concorde into service to the United States in early 1976. They further advised that prior to putting the aircraft into commercial service, a series of "endurance and route-proving" flights to the United States were contemplated. Based on this information, the FAA began preparation of an EIS. In January 1975, the British and French governments requested a meeting with Department of Transportation (DOT)/FAA to explore the progress of the EIS and the likely date for a U.S. decision with respect to the scheduled flight activity of the Concorde.

Meetings were held on January 23 and 24, 1975, at which the British and French government representatives were advised that, under the then existing schedule, a draft EIS would be issued about the first of February dealing principally with the proposed endurance and route-proving flights that were then scheduled to commence about July 1, 1975. They were advised that the EIS would be supplemented if the data developed during these

flights proved to be at variance with the data in the EIS and, thus, significantly affected

[p. I-3]

any decision on the application for amendment of the airlines' operations specifications (which amendment would be necessary to permit the entry of Concorde into regular commercial service to the U.S.). They were further advised that that process would not permit a final decision on the operations specifications amendment until well beyond January 1, 1976.

The British and French government representatives advised that such a delay would impose significant economic penalties on both the manufacturers of the Concorde and the airlines operating the Concorde. They further advised that to avoid these severe economic penalties they would need a firm U.S. decision with respect to an amendment of their operations specifications not later than September 1, 1975. To facilitate a decision by that date the British and French proposed to issue an airworthiness certificate to the Concorde, which they would be in a position to do prior to July 1, 1975. Under the terms of the Convention on International Civil Aviation (Chicago Convention) the issuance of the certificate would permit the aircraft to be operated into the United States for non-revenue purposes without action by the United States government.

It was acknowledged that certification of the Concorde by France and the United Kingdom would alter the premises upon which FAA was then proceeding. The British and French were advised, however, that if the only immediate action pending was an application for amendment of the operations specifications which would permit an unlimited number of Concorde flights to the U.S., the

environmental data available to DOT/FAA would not support such a decision.

[p. I-4]

The British and French stated that they would consider whether a more limited application might be made that would not prejudice their rights as contracting parties under the Chicago Convention and their rights under existing bilateral agreements with the United States.

Subsequently, the two governments informed DOT/FAA that the applications by Air France and British Airways for amendment of their operations specifications would be accompanied by a statement that the applications were being made for a specified number of flights to specified airports. The British and French were informed that those terms would be acceptable as a basis for starting the EIS process. It was understood by all concerned, however, that the acceptance of an application under the terms proposed did not constitute a decision with respect to the proposed amendments; that a decision on the application could be made only after the EIS process was completed; and that the operations specifications amendment, if any, finally effected by the FAA might or might not be in accordance with the terms of the application. It was further understood that any request from the applicants to change any flight frequency finally approved would constitute another request for amendment of the operations specifications and could require another environmental analysis. Finally, it was understood that regardless of the Federal decision on the applications, the airlines must obtain any necessary authorization from the airport operators whose airports they proposed to serve before flights could be conducted to those airports. In this

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instance, while FAA operates Dulles International Air-

port, the Port Authority of New York and New Jersey operates John F. Kennedy International Airport.

Pursuant to the National Environmental Policy Act the FAA then prepared and circulated for public review and comment a draft environmental impact statement (EIS) concerning the anticipated applications from British Airways and Air France to amend their operations specifications. The draft environmental impact statement prepared by the FAA was made available to the Council on Environmental Quality and the general public on March 3, 1975. A series of public hearings were held in conjunction with this draft EIS. These hearings were held in Washington, D.C. on April 14 and 15, in New York City on April 18, 19 and 24, and in Sterling Park, Virginia on the evening of April 21. In addition to the testimony received at the public hearings, over 2,900 written comments were received from a wide variety of federal, state and local agencies and officials, as well as various organizations and numerous individual citizens. Approximately 500 of the comments were in the form of petitions. Among those who commented, about 60 supported the operation of the Concorde by British Airways and Air France while approximately 2,900 objected to the proposed operations.

The comments on the draft EIS were wide-ranging in both subject matter and depth of presentation. Many were brief comments which objected to the operation of the Concorde into and out of the United States by any operator. Many of the comments addressed

[p. I-6]

non-environmental issues. Included in the category of non-environmental issues were comments addressed to the social benefit of the Concorde, or the lack of such benefit, as viewed by the commentator. Other commentators raised

issues of public policy interpretation—e.g., the meaning of the Congressional action in 1971 which halted Federal funding of U.S. development of a supersonic transport, and economics—e.g., possible economic consequences of Concorde operation on other international air carriers such as Pan American and Trans World Airlines. There were also a number of comments of a political nature—e.g., "why bail out the French and British?" as well as comments on policy issues—e.g., permitting operation of the Concorde was argued as inconsistent with the present trend toward the reduction of aircraft noise. Another type of non-environmental issue raised during the public comment period concerned safety—e.g., the safety of the left turn after takeoff from runway 31 Left at JFK initiated while climbing through an altitude of approximately 100 feet above the ground, requiring a bank of approximately 25 degrees.

Many commentators erroneously assumed that the FAA had already made a decision concerning the request to operate the Concorde into and out of the United States. This was not the case. A decision concerning Concorde was not made until this final environmental impact statement was completed and action will not be taken for at least 30 days after the filing of this final EIS. In preparing this final EIS all written comments and hearings transcripts have been carefully considered.

[p. I-7]

The environmental impact of the proposed operation of the Concorde is one of the factors to be considered in arriving at a decision on the British/French request. The decision, however, will not be based solely on environmental considerations, but will take into account a wider variety of factors, including economic, international and policy considerations. These non-environmental elements are being separately considered. From an en-

vironmental perspective, as noted earlier, any action to approve the operations specifications of British Airways and Air France may or may not be in accordance with the terms of their appliaction. Existing U.S. treaty obligations do not prohibit the alternative of denying the requested amendments nor do they require the issuance of these amendments. The use of additional restrictions deemed necessary from a U.S. environmental policy viewpoint is not precluded.

In the letters of intent concerning an amendment of their operations specifications, British Airways and Air France propose to conduct limited commercial service into JFK and IAD. If approved, Concorde operations would start with one flight per day per carrier at JFK increasing to an average authorized level of two flights per day per carrier or a total of four flights per day at JFK. At IAD, if the amendment of the operations specifications is approved, there would be approximately three flights per week per carrier increasing to an average authorized level of one flight per day per carrier or a total of two flights per day at IAD.

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Finally, as noted earlier, British Airways and Air France must obtain any necessary authorization from the airport operators whose airports they propose to serve with the Concorde before flights could be conducted to those airports.

Distribution of Final EIS

In view of the voluminous comments received by FAA in connection with the Concorde, the FAA has consulted with the Council on Environmental Quality (CEQ) pursuant to the CEQ Guidelines Section 1500.10(b) (40 CFR 1500.10(b)) (Appendix B). Based on that consultation, the following decisions concerning distribution of and at-

tachments to this final EIS have been made. Volume One of this final EIS, including a summary of the substantive comments received and FAA's responses to those substantive comments, has been sent to all those persons, agencies and groups who submitted substantive comments on the draft EIS. Volume Two, which is a copy of the verbatim substantive comments, has been sent to appropriate federal, state and local agencies. Additionally, the transcript of the public hearings (Volume Three) and the verbatim substantive comments are available for review at the FAA Office of Environmental Quality in Washington, D.C. and the FAA Regional Office in Jamaica, N.Y. as well as public libraries in the JFK and IAD areas listed in Appendix B. The other comments received by FAA have been collected as Volume Four and are available for review at the FAA Office of Environmental Quality in Washington, D.C. Copies of reference material utilized in preparing this final EIS are available for review at the FAA Office of Environmental Quality in Washington, D.C.

Excerpt from Chap. IV

[p. IV-22]

E. *Operational Procedures*

Prior to the conduct of any route-proving flights, or the initiation of regularly scheduled commercial operation of the Concorde, the operator of the aircraft must obtain the necessary authorizations from the operator(s) of the specific airport(s) involved. The Port Authority of New York and New Jersey has a long-standing noise limit at JFK of 112 PNdB (perceived noise decibels) at specific locations under departure paths. The manufacturers of the Concorde have stated that they feel the Concorde can comply with this limitation through appropriate operational procedures.

Appendix E

A noise abatement takeoff procedure has been developed to reduce the Concorde's noise impact as much as possible. This procedure basically involves the application of full thrust plus afterburner augmentation to increase speed and gain altitude rapidly. Approximately 60 seconds after the start of takeoff roll the afterburner is shut off and the power is reduced to establish a 3% climp gradient. This power reduction for noise abatement purposes has been combined with a procedure to turn away from populated areas.

The consequences of the application of these techniques are set out in detail in Section VI of this final EIS. In general, the application of these techniques would ameliorate the Concorde's noise impact in the: Far Rockaway/Atlantic Beach area for takeoffs from runway 13 Right at JFK; the East Rockaway/Valley Stream

[p. IV-23]

area for takeoffs from runway 4 Left. (Runway 4 Left would generally not be used for takeoff by the Concorde.)

The noise abatement takeoff procedure from runway 31 Left at JFK requires a climbing left turn initiated when the Concorde is approximately 100 feet above the runway. The aircraft would turn left, away from the Howard Beach/Canarsie area, and the power would be reduced (Ref. 12, "Noise Performance at Kennedy Airport Based on Casablanca and Toulouse Tests").

At Dulles the power reduction procedure would provide some amelioration of Concorde's noise to: the Brookfield/Greenbriar area for takeoffs from runway 19 Left; the Sterling Park area for takeoffs from runway 1 Left; and the residents of Arcola for takeoffs from runway 30. (Runway 30 would be used by Concorde only when there is a strong northwest wind condition.)

Appendix E

Excerpt from Chap. X

[p. X-1]

RESPONSE TO SUBSTANTIVE COMMENTS

In view of the extraordinary volume of comments on the draft environmental impact statement, an individual response to each comment is not practicable. Since many of the same issues were raised several times by different commentators, individual responses would be unduly repetitive. The comments received have been carefully reviewed and, in accordance with CEQ guidelines, 40 CFR 1500.10(a), issues raised by one or more commentators have been summarized. The comments have been summarized without bias to the meaning. The summarized comments and the FAA's responses are set out below.

A. *General Comments*

* * *

[p. X-29]

"8. *Comment:* Will airport operators be free to impose their own restrictions on the operation of the Concorde?

Response: Yes. The airport operators will be free to impose non-discriminatory restrictions on the operation of the Concorde."

Appendix F *

EXCERPTS FROM CONCORDE SUPERSONIC TRANSPORT AIRCRAFT DRAFT ENVIRONMENTAL IMPACT STATEMENT MARCH 1975

[p. 1]

The National Environmental Policy Act of 1969 (NEPA) requires that, prior to taking a major Federal action which may significantly affect the quality of the human environment, a detailed statement shall be prepared which analyzes the environmental impact of the proposed action.

The FAA has received applications from British Airways and Air France requesting amendment of their operations specifications under FAR 129. (Appendix A) The amendment of operations specifications requested will permit British Airways and Air France to operate the Concorde in limited regular commercial service into and out of John F. Kennedy International Airport in New York (JFK) and Dulles International Airport in Virginia (IAD). The amendment of operations specifications would occur after the issuance of a certificate of airworthiness to the Concorde by the responsible British-French aviation authorities and would be pursuant to applicable provisions of the Convention on International Civil Aviation (Chicago Convention) to which treaty the United States, France and the United Kingdom are signatories and which has been ratified by each of them.

Prior to the initiation of regular service, it is anticipated that there will be a number of flights by Concorde into and out of these airports. These route-proving flights are preliminary to and associated with the initiation of commercial

*Renumbered Appendix I-F before the Second Circuit.

service. The total number of

[p. 2]

route-proving flights expected is approximately 20 to 30. It is not expected that there would be more than two such route-proving flights in any one day at any specific airport.

The requests for Federal action that prompts this draft EIS are the applications from two foreign flag airlines. That fact introduces some unique considerations into the development of the EIS; specifically the various treaty arrangements between those governments and the United States.

The British and French governments informally advised the FAA in the summer of 1974 that the present schedule of their flag carriers contemplated putting the Concorde into service to the United States in 1976. They further advised that prior to putting the aircraft into commercial service, a series of "endurance and route-proving" flights to the United States was contemplated.

Based on this information, the FAA began preparation of an EIS. In January 1975, the British and French governments requested a meeting with FAA/OST to explore the progress of the EIS and the likely date for a U.S. decision with respect to the scheduled flight activity of the Concorde.

Meetings were held on January 23 and 24 at which the two governments were advised that, under the then existing schedule, a draft EIS would be issued about the first of February dealing principally with the proposed endurance and route-proving flights that were scheduled to commence about July 1. They were advised that the EIS would be supplemented if the data developed during those flights proved to be at variance with the data in the EIS and, thus,

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significantly affected any decision on the application for

amendment of the airlines' operations specifications (which amendment would be necessary to permit the entry of the Concorde into regular commercial service to the U.S.). They were further advised that that process would not permit a final decision on the operations specifications amendment until well beyond January 1, 1976.

The two governments advised that such a delay would impose very significant economic penalties both on the manufacturers of the Concorde and on the airlines operating the Concorde. They further advised that to avoid these severe economic penalties they would need a firm U.S. decision with respect to the application for amendment of the operations specifications not later than September 1, 1975. To facilitate a decision by that date they proposed to issue an airworthiness certificate to the Concorde, which they would be in a position to do prior to July 1, 1975. Under the terms of the Chicago Convention, the issuance of the certificate would permit the aircraft to be operated into the United States for non-revenue purposes without action by the United States Government.

It was acknowledged that certification of the Concorde by France and the United Kingdom would alter the premises upon which FAA was then proceeding. The British and French were advised, however, that if the only immediate action pending was an application for amendment of the operations specifications which would permit an unlimited number of Concorde flights to the U.S., the available environmental data would not support such a decision. The British and French stated that they would consider whether a more limited application might be made that

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would not prejudice the rights of contracting parties under the Chicago Convention and rights under bilateral agreements with the United States.

Appendix F

Subsequently, the two governments informed FAA that applications by Air France and British Airways for amendment of their operations specifications would be accompanied by a statement that the applications were being made for a specified number of flights to specified airports. The British and French were informed that an application in those terms would be acceptable as a basis for starting the EIS process. It was understood by all concerned, however, that the acceptance of an application under the terms proposed did not constitute a decision by the FAA with respect to the proposed amendments; that a decision on the applications could be made only after the EIS process was completed; and that the amendment, if any, finally effected by the FAA might not be in accordance with the terms of the application. It was further understood that any request from the applicants to change any flight frequency finally approved would constitute another request for amendment of the operations specifications and could require another environmental analysis. Finally, it was understood that regardless of the Federal decision on the applications, the airlines must also obtain any necessary authorization from the airport operators whose airports they proposed to serve before flights could be conducted to those airports.

The FAA has been advised that the Environmental Protection Agency would shortly submit to FAA a proposed noise rule for SST's pursuant to Section 611(c) of the Federal Aviation Act. The FAA

[p. 5]

understands that the EPA proposal would require future SST's to meet current subsonic noise levels. It was also understood that EPA would recommend that FAA consider instituting separate rulemaking proceedings for the purpose of establishing operating limitations for Concordes and TU-144's of current design. If such an operating rule

were established, it would of course govern future operations of the Concorde to the United States, including any authorized as a result of the amendments to the operations specifications submitted by Air France and British Airways.

II

PURPOSE

[p. 6]

The purpose of this environmental impact statement is to analyze the potential environmental impact of the events referred to previously. The prospective actions facing the FAA are:

A. Approving or granting an amendment to the operations specifications of British Airways and Air France under FAR 129 (14 CFR Part 129) authorizing those two air carriers to operate the Concorde in limited regular commercial fare-paying service into and out of the United States beginning in early 1976.

This environmental impact statement assumes that a certificate of airworthiness will be issued to Concorde by the aviation authorities of the Republic of France and the United Kingdom prior to route-proving flights and operation of Concorde by Air France and British Airways in regular commercial service.

This statement is primarily directed toward analyzing the operation of Concorde by British Airways and Air France into and out of JFK and IAD. These are the only two carriers who have purchased the Concorde to date. They are the only carriers who have indicated an intent to operate it into and out of the United States.

As previously noted there may be a limited number of Concorde flights prior to the initiation of regular service. Since these route-proving flights are directly related to the

initiation of regular Concorde service they have not been considered separately but included within this impact

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statement. Our expectation is that these flights will be limited in both number and time. There may be a total of approximately 20 to 30 flights, with some occuring in the summer of 1975 and others in the late fall/early winter of 1975. Not all of these flights are expected to be at the same airport. The purpose of these route-proving flights is related to flight crew proficiency as well as demonstrating airport-aircraft interrelationship. There is no Federal action associated with these route-proving flights other than authorization into and out of Dulles since the aircraft will be certificated by the responsible British and French authorities to standards established by ICAO Annex 8. These will not be commercial flights conducted pursuant to Article 5 of the Chicago Convention.

B. Since some Concorde flights may be conducted into and out of Dulles International Airport, which is owned by the Federal government and operated by the FAA any action by the FAA in its role as airport operator is included within the scope of this EIS.

C. The FAA has received an application for a United States type certificate for the Concorde from British Aircraft Corporation and Sud-Aviation dated July 13, 1965. (Appendix B)

This environmental impact statement will also consider the possibility of type certification of Concorde by the FAA and operation of Concorde by U.S. and other foreign air carriers. The potential for future growth of Concorde operations is, in part, a function of the economic and/or marketing impact of initial Concorde service by Air France and British Airways. An estimate of that impact is contained in this statement.

Appendix F

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D. *Volume of Concorde Operations*

At the present time the governments of the Republic of France and the United Kingdom have authorized the production of sixteen Concordes. Of these sixteen aircraft nine have been sold: five to British Airways and four to Air France. The remaining seven aircraft authorized to be constructed and available for sale have not been sold.

Regular operations into and out of the United States by British Airways and Air France, based on the application for an amendment of their operations specifications are anticipated to occur at John F. Kennedy International in New York (JFK) and Dulles International in Virginia (IAD). (Figures 2, 8, 9) Route-proving flights to JFK and IAD will be conducted prior to the institution of regular service.

The route-proving flights will be limited in number. Approximately 20 to 30 total flights are anticipated during the summer and the late fall/early winter of 1975. There would not be more than two flights per day at any specific airport.

Prior to the conduct of any route-proving flights, or the initiation of regularly scheduled commercial operation of the Concorde, the operator of the aircraft must obtain the necessary authorizations from the operator(s) of the specific airport(s) involved. The Port Authority of New York and New Jersey has a long-standing noise limit at JFK of 112 PNdB (perceived noise level) at specific locations under departure paths. The manufacturers of the Concorde have stated that they feel the Concorde can comply with this limitation through appropriate operational procedures.

Appendix G *

Excerpts from the Report of the Special Meeting on Aircraft Noise in the Vicinity of Aerodromes, 1969

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3—Report on Agenda Item 3 **3-1**

Agenda Item 3: Noise Certification

Establishment of agreement on the need, criteria and method for aircraft noise certification and the development, to the extent considered feasible, of international specifications thereon.

3:1 *General principles and status of an aircraft noise certification scheme*

3:1.1 The Meeting discussed the principles that should be followed in the development of an international scheme for noise certification of aircraft and the status that should be given to the specifications to be included in such a scheme. The Meeting although observing that there were no specific provisions either in the Convention on International Civil Aviation or in any of the ICAO documents directly dealing with any of the aspects relating to aircraft noise, nevertheless took cognizance of the fact that Article 37 of the Convention provides for adoption by ICAO of International Standards and Recommended Practices and Procedures dealing with any matters relating to the safety, regularity and efficiency of air navigation as may from time to time be necessary.

3:1.2 Taking into consideration the effects of aircraft noise on people in the vicinity of aerodromes and the various methods used at present to reduce the nuisance of such noise and the technological developments in the design of aircraft and powerplants that make it possible to

*Renumbered Appendix I-G before the Second Circuit.

reduce the noise levels at the source, it was agreed that there was a requirement for an internationally agreed framework for noise certification of aircraft within the scope of the ICAO Convention. It was further agreed that such a framework should consist of specifications that would include all relevant matters such as certification test details, methods of noise measurement, the prescribed maximum noise levels in agreed units etc., it being understood, that such maxima would be limited by what is technically feasible and economically reasonable.

3:1.3 It was also recognized that an introduction of any noise certification scheme was liable to impose economic penalties which would have to be met by various parties concerned. In order to ensure a unifom distribution of such penalties among all concerned, it was considered essential that the status of such a scheme should be such that it would be obligatory on the part of the participating States to comply with the requirements of this scheme. Furthermore, there was agreement that such a scheme should be capable of uniform interpretation. Consequently it was agreed unanimously that the noise certification scheme that might be developed by the Meeting should be in the form of ICAO Standards. It was also stressed that the ICAO Standards on noise certification would, as in the case of other Standards, be considered as the minimum international standards and that States could apply more stringent requirements to the aircraft on their national registers, if they so desired. Such more stringent national requirements would not, however, extend to foreign registered aircraft and the competitive inequities that could result were recognized. Foreign aircraft complying with the ICAO noise certification Standards would, noisewise, be allowed to operate subject only to such additional noise restrictions that might be specified by the

responsible authority(ies) in relation to an aerodrome(s) due to local considerations applied on a non-discriminatory basis as between foreign and domestic aircraft.

3:1.4 The Meeting next considered the question of whether the Standards relating to the noise certification scheme should be incorporated in any of the existing ICAO Annexes or whether they should appear in a new and separate Annex. The Meeting had before it extensive documentation explaining in detail the applicability and the limitations of the various existing Annexes, in particular Annexes 6 and 8, and the Articles of the Convention governing [p. 49] the provisions in these Annexes. After examining these the Meeting came to the conclusion that the noise certification Standards to be developed during the course of discussions on this Agenda Item should be issued in a new and separate Annex, which should deal exclusively with aircraft noise and which should therefore also include, to the extent practicable, related noise specifications and, as necessary, supplementary guidance dealing with other aspects of noise. It was also agreed that the specifications developed by the Meeting during discussions on Agenda Item 1, referred to in Recommendations 1/1, 1/2 and 1/4, should also be incorporated in appropriate places in the proposed new Annex on aircraft noise.

3:1.5 Accordingly Recommendation 3/1 was developed as follows:

RSPP RECOMMENDATION 3/1—

AIRCRAFT NOISE CERTIFICATION STANDARDS IN A NOISE ANNEX

i) That essential aircraft noise certification requirements be in the form of ICAO Standards; and

ii) That a new and separate ICAO Annex "X" dealing exclusively with "Aircraft Noise" be issued. This Annex should include:

a) aircraft noise certification Standards and, to the extent possible,

b) specifications and associated supplementary guidance relating to other aspects of aircraft noise, e.g. noise measurement for monitoring purposes, noise assessment for land-use planning purposes, etc.

3:2 *Development of noise certification Standards*

3:2.1 It was considered that the noise certification Standards should contain parts dealing with Definitions as necessary; Administrative Requirements and detailed Technical Requirements.

3:2.2 *Administrative requirements*

3:2.2.1 The Meeting discussed briefly the basic principles that should be followed in drafting the administrative requirements for aircraft noise certification. It was agreed that these requirements should, broadly, be similar to those in Annex 8 relating to airworthiness certification. It was, however, noted that while the rights and obligations of States in relation to airworthiness certification were defined in a number of Articles of the Convention on International Civil Aviation, there were no equivalent provisions in the Convention which could be applied to aircraft noise certification. Since an amendment to the Convention would be a cumbersome and lengthy process, it was agreed that the noise certification Standards should be so formu-

lated that they would themselves impose obligations on Contracting States with respect to compliance with the ICAO aircraft noise certification Standards and the recognition by other States of the noise certification granted in accordance with the ICAO Standards. It was however clearly understood that, being in the form of Annex material, States could, if the circumstance outlined in Article 38 of the Convention applied, file Differences with any of the Standards although it was hoped that such action would not prove to be necessary. It was noted that several States intended to compel compliance with the proposed ICAO Standards under their national regulations and had given notice that such Differences would not be accepted. Unlike the Standards relating to airworthiness certification, Article 39(a) of the Convention would not apply.

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3:2.2.2 It was agreed that the document attesting compliance with the applicable noise certification Standards could be in a form of either a separate "Noise Certificate" or a statement contained in any other document approved by the State of Registry and required by that State to be carried in the aircraft. Such documentation should provide, in addition to the basic aircraft information, a statement of additional modifications, if any, incorporated for the purpose of compliance with the applicable noise certification Standards and the maximum weight at which compliance with these Standards had been demonstrated.

3:2.2.3 It was suggested that a paragraph should be included in the administrative, or other appropriate part of the proposed Annex on aircraft noise, requiring aircraft manufacturers to provide information on

a) an operating procedure by which certificated noise levels could be achieved; and

b) profiles of noise characteristics that would enable evaluation of noise levels in units other than that used for noise certification purposes.

While there was general agreement that information of this sort would definitely be required by those responsible for aerodrome and land-use planning, the planning of operations and the development of necessary operating procedures, it was the view of the majority that it would be inappropriate to include such a requirement in that part of the Annex dealing with aircraft noise certification. In support of the latter viewpoint, it was stated that the State of Registry is normally free to ask from the manufacturers and the operators any additional information that it may consider necessary for planning of aerodrome and land-use and operations of aircraft on its Register. Furthermore provision of such information is perhaps more important in respect of aircraft which have not been noise certificated and of which the noise characteristics are not known. In view of this, inclusion in Annex "X"—"Aircraft Noise"—of a requirement for the provision of information referred to in a) and b) above was questioned. After considerable discussion, it was agreed that a recommendation should be framed requesting the aircraft manufacturers and operators to provide to the State of Registry and other interested authorities the basic information related to the noise characteristics and performance of aircraft to enable them to calculate the noise contours in the vicinity of aerodrome(s). It was further agreed that this information might conveniently be provided in the Aeroplane Flight Manual, or in the Operations Manual, or in other documents, as appropriate.

3:2.2.4 Based on the above considerations, the Meeting prepared the detailed Administrative Standards, which

are included in Appendix A hereto, and agreed to Recommendations 3/2 and 3/3:

RSPP RECOMMENDATION 3/2—

ADMINISTRATIVE PART OF ANNEX "X"

That the aircraft noise certification Standards in Appendix A be included in the Administrative Part of Annex "X"—"Aircraft Noise".

RECOMMENDATION 3/3—

PROVISION OF INFORMATION TO ENABLE CALCULATION OF NOISE CONTOURS IN THE VICINITY OF AERODROMES

That aircraft manufacturers and operators, where so requested by the State of Registry or by other interested authorities, collaborate in providing basic information related to aircraft [p. 51] noise and performance characteristics that would enable noise contours in the vicinity of the aerodrome(s) to be calculated.

(This information may conveniently be provided in the Aeroplane Flight Manual, or in the Operations Manual, or in other documents, as appropriate.)

3:2.2.5 The Meeting also considered the question of imposing certain obligations on operators of aircraft to which noise certification Standards apply. These include the carriage, during all international flights, of a document attesting noise certification and observance of limitations, if any, on take-off and/or landing weights imposed by the applicable noise certification Standards. It was agreed that these requirements should be included in Annex 6, Parts I and II—Operation of aircraft. It was also decided that a suitable clause should be included in these Annexes

which would permit operations at weights higher than the noise certificated weights, but still within the maximum weights determined by the airworthiness requirements, at an aerodrome having no noise problems and in respect of which the competent authorities in the State in which the aerodrome is situated have not specified any noise restrictions. Accordingly Recommendations 3/4 and 3/5 were developed as follows:

RSPP RECOMMENDATION 3/4—

AMENDMENT OF ANNEX 6—PART I—OPERATION OF AIRCRAFT—INTERNATIONAL COMMERCIAL AIR TRANSPORT

That Annex 6, Part I, be amended as follows:

i) *Chapter 5—Aeroplane Performance Operating Limitations*

ADD the following at an appropriate place:

"In no case shall the weight at the start of take-off or at the expected time of landing at the aerodrome of intended landing and at any alternate aerodrome exceed the relevant maximum weights at which compliance has been demonstrated with the applicable noise certification Standards in Annex "X", unless otherwise authorized for a certain aerodrome on a runway with the competent authority in the State in which the aerodrome is situated."

ii) *ADD* a new paragraph at an appropriate place in the Annex:

"All Aeroplanes complying with the Noise Certification Standards in Annex 'X'."

An aeroplane shall carry a document attesting noise certification."

RSPP RECOMMENDATION 3/5—

AMENDMENT OF ANNEX 6—PART II—INTERNATIONAL GENERAL AVIATION

That Annex 6, Part II, be amended as follows:

i) *Chapter 5—Aeroplane Performance Operating Limitations*

AMEND the first sentence to read as follows:

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"An aeroplane shall be operated:

a) in compliance with the terms of its airworthiness certificate or equivalent approved document;

b) within the operating limitations prescribed by the certificating authority of the State of Registry; and

c) within the weight limitations imposed by compliance with the applicable noise certification Standards in Annex "X", unless otherwise authorized for a certain aerodrome or a runway by the competent authority of the State in which the aerodrome is situated.

ii) *ADD* a new paragraph at an appropriate place in the Annex:

"All Aeroplanes complying with the Noise Certification Standards in Annex "X"."
An aeroplane shall carry a document attesting noise certification."

Appendix G

3:2.3 *Technical requirements*

3:2.3.1 *Applicability*

3:2.3.1.1. It was agreed at the outset that eventually all aircraft should be required to comply with noise certification Standards. This was considered important from the viewpoint of overall noise disturbance and land-use control at aerodromes which cater for operations of a variety of aircraft types. However, in view of the fact that large subsonic turbojet powered aeroplanes are considered to be the major source of disturbance, most work related to noise reduction has so far been directed to quietening these types of aeroplanes. Furthermore, since different types of aircraft have widely different performance characteristics and create different amounts of noise, it was considered impracticable initially to draw up a single set of noise certification standards which could be applied to all types of aircraft. It was therefore agreed that in the first instance the Meeting should concentrate on developing noise certification standards in respect of those subsonic conventional turbojet aeroplanes which were expected to be introduced in international air navigation in the near future and in respect of which the airworthiness requirements were already laid down. In limiting the immediate objectives of aircraft noise certification in this manner, the Meeting expressed the hope that it would be possible for the appropriate authorities to introduce in respect of other aircraft types the requisite acoustic requirements when developing the airworthiness requirements.

3:2.3.1.2. There was a suggestion that consideration should also be given to SST aircraft which will be using the same aerodromes as the large subsonic turbojet aeroplanes during the next few years. However, since the Meet-

ing did not have available to it material on which to base its considerations, it was agreed that it was not possible at present to include SST aircraft in the noise certification scheme. The importance of developing expeditiously international noise certification standards for these aircraft was nevertheless emphasized. It was agreed that further consideration should be given to this aspect, when discussing future work to be done on aircraft noise certification.

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3:2.3.1.3 The Meeting also agreed to exclude, for the present, from the international noise certification Scheme:

i) all aircraft having a maximum take-off weight of 5700 kg (12,566 lb.) or less; and

ii) all STOL/VTOL aircraft, including helicopters.

For the purpose of noise certification, it was agreed, that in this particular context, STOL aircraft would be those aircraft certificated for a field length of 450 metres or less at maximum certificated weights.

3:2.3.1.4 It was noted that as a result of technological developments in engine design, it had become possible to produce quieter engines with high by-pass ratio. To take advantage of these developments, it was agreed that the noise certification Standards to be developed should be applicable to all subsonic turbojet aeroplanes powered by engines with a by-pass ratio of 2 or more.

3:2.3.1.5 On the basis of the above considerations the Meeting agreed that the ICAO noise certification Standards should be developed, at present, for the following:

"All subsonic turbojet aeroplanes of over 5700 kg (12,566 lb.) weight, other than aeroplanes certificated

for a field length of 450 metres or less, which are either:

a) powered by engines with a by-pass ratio of 2 or more (calculated at maximum power under static sea level take-off conditions); *or*

b) powered by other classes of engines, in respect of which the application for certificate of airworthiness for the prototype was accepted, or some other substantially equivalent procedure was carried out by the certificating authorities, on or after 1 January 1969."

3:2.3.2 *Maximum noise level measurement and associated matters*

3:2.3.2.1 The Meeting considered separately and in conjunction with each other, four closely related aspects of specifications to be included in the noise certification Standard, namely:

a) the noise measurement points;

b) the maximum noise levels at those points;

c) the allowable trade-offs;

d) the flight test procedures;

taking into account as necessary operational specifications relevant to the development of the noise certification Standards.

3:2.3.2.2 Before taking up the matter in detail, the Meeting decided upon the following principles:

i) that, in accordance with ICAO policy, all measurement distances should [p. 54] be expressed in metres and that aeroplane weights should be expressed in kg, with appropriate equivalents in other

units, in common use, being given as necessary in parentheses;

ii) that no operational procedure stipulated for noise certification tests should conflict with ICAO airworthiness specifications, nor should above average piloting skill be required in order to execute the procedures; and

iii) that maximum noise levels would need to be within the bounds of current or foreseeable technical knowledge.

3:2.3.2.3 In connexion with i) above, a study was undertaken which showed that a system of requirements expressed in metric units rounded off as per paragraphs 3:2.3.2.6, 3:2.3.2.7 and 3:2.3.2.9 did not differ significantly for any given areoplane weight as compared with those requirements, based on identical principles expressed in rounded figures of nautical miles, feet and pounds, which had previously been discussed.

3:2.3.2.4 The Meeting also agreed not to recommend different specifications, for such matters as measurement points or operating procedures, for aeroplanes having a different number of engines.

3:2.3.2.5 The Meeting stressed that, in specifying the operating procedures to be followed for noise certification demonstration purposes, it was not intending to prejudice any recommendation that might at a later stage of the Meeting be taken under Agenda Item 4. Standardized noise test procedures were required but there was no implication that the procedure chosen represented an optimum procedure for any given aeroplane or aerodrome.

3:2.3.2.6 On more specific matters, the Meeting agreed, *with reference to measurement points* that:

i) with respect to the *lateral* measurement point, this should be the point on a line parallel to and 650 metres from the runway centre line or extended runway centre line, where the noise level is a maximum during take-off;

ii) with respect to the *flyover* measurement point, this should be at a distance of 6,500 metres (3.5 NM) from the start of roll on the extended centre line of the runway;

iii) with respect to the *approach* measurement point, this should be identified as the position on the ground, on the extended centre line of the runway, 120 metres (394 ft) vertically below the 3° descent path, originating from a point 300 metres beyond the threshold. On level ground this corresponds to a position 2,000 metres from the threshold.

3:2.3.2.7 The Meeting also agreed, *with reference to the flight test procedures at take-off* that:

i) take-off thrust should be used from the start of take-off to the point at which a height of at least 210 metres (700 ft) above the runway is reached and the thrust thereafter should not be reduced below that thrust which will maintain a climb gradient of at least 4%;

[p. 55]

ii) a speed of at least V_2 + 10 kts should be attained as soon as practicable after lift-off and be maintained throughout the take-off test and;

iii) a constant take-off configuration (except for the position of the landing gear) selected by the applicant should be maintained throughout the take-off noise certification demonstration test.

Appendix G

3:2.3.2.8 The Meeting also agreed, *with reference to flight test procedures on approach,* that:

i) the aeroplane should be stabilized and following a 3° ± 5° glide slope;

ii) the configuration of the aeroplane should be with maximum allowable landing flap setting; and

iii) the approach should be made at a stabilized airspeed of not less than 1.3V. + 10 kts, with thrust stabilized during approach and over the measuring point and continued to a normal touchdown.

3:2.3.2.9 The Meeting also agreed, with reference to the maximum noise levels, on the following:

i) *Lateral and Approach* maximum noise levels should be 108 EPNdB for aeroplanes with maximum take-off weights of 272,000 kg (599,680 lb) or over, less 2 EPNdB per halving of the 272,000 kg (599,680 lb) maximum down to 102 EPNdB for maximum weights of 34,000 kg (74,960 lb) or less.

ii) *Flyover* maximum noise levels should be 108 EPNdB for aeroplanes with maximum take-off weights of 272,000 kg (599,680 lb) or over, less 5 EPNdB per halving of the 272,000 kg (599,680 lb) maximum down to 93 EPNdB for maximum weights of 34,000 kg (74,960 lb) or less.

Note: The noise levels should vary linearly with the logarithm of aeroplane weight between the weight limits specified above.

3:2.3.2.10 The Meeting also agreed with reference to *trade-offs* that maximum noise levels may be exceeded at one or two points provided that:

a) the sum of any exceedences does not exceed 4 EPNdB;

b) any excess at any single point is not greater than 3 EPNdB; and

c) any exceedences are offset by corresponding reductions at the other point or points.

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3:2.3.3 *Noise evaluation method*

3:2.3.3.1 During discussions on Agenda Item 1, the Meeting had already developed detailed requirements for (see Appendix A of the Report on Agenda Item 1):

a) measurement of aircraft noise received on the ground;

b) calculation of effective perceived noise levels from measured noise data;

c) appropriate symbols and units;

d) mathematical formulation of Noy Tables, and

e) sound attenuation in air.

3:2.3.3.2 The discussions during consideration of Agenda Item 3 were therefore limited to methods to be used to correct the measured data to the agreed meteorological, environmental and operational conditions. As a result of these discussions, the Meeting, using the appropriate Sections of the comprehensive paper referred to in paragraph 1:2.2, developed detailed requirements for:

a) noise certification test and measurement conditions;

b) reporting to the certificating authorities and correcting the measured data; and

c) detailed correction procedures taking into account the correction resulting from:

i) atmospheric absorption of sound under test conditions different from reference conditions;

ii) test flight path at altitude different from the reference altitude; and

iii) test weight different from maximum.

The Meeting agreed that the above-mentioned requirements together with the requirements developed by it earlier and referred in paragraph 3:2.3.3.1 should constitute the Noise Evaluation Method for the purpose of compliance with the proposed noise certification Standards and should therefore form part of the technical standards to be included in Annex "X"—"Aircraft Noise".

3:2.3.4 Based on the above considerations, the Meeting prepared the detailed technical standards, which are included in Appendix B hereto, and agreed to Recommendation 3/6, as follows:

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RSPP RECOMMENDATION 3/6—

TECHNICAL PART OF ANNEX "X"

That the aircraft noise certification Standards in Appendix B be included in the Technical Part of Annex "X"—"Aircraft Noise".

3:2.4 *Definitions*

3:2.4.1 It was agreed that definitions for the following terms emanating from discussions on noise certification should be included in Annex "X"—Aircraft Noise":

a) aeroplane,

b) aircraft,

c) subsonic aeroplane,

d) by-pass ratio.

Accordingly the Meeting agreed to Recommendation 3/7 as follows:

RSPP RECOMMENDATION 3/7—

DEFINITIONS

That the following Definitions be included in the "Definitions" Part of Annex "X"—"Aircraft Noise":

Aeroplane—
A power-driven heavier-than-air aircraft, deriving its lift in flight chiefly from aerodynamic reactions on surfaces which remain fixed under given conditions of flight.

Aircraft—
Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface.

By-pass Ratio—
The ratio of the airmass passing through the by-pass ducts of a jet engine to the air mass passing through the combustion chambers.

Subsonic aeroplane—
An aeroplane incapable of sustaining level flight at speeds exceeding flight Mach number of 1.

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3:3 *Retrofitting of current turbojet aeroplanes*

3:3.1 It was stated that the reduction of noise, expected to result from the application of noise certification Stan-

dards to future subsonic turbojet aeroplanes, would not become of major significance earlier than 1974-75 when noise-certificated aeroplanes would be operating in noticeable numbers. In the meantime, the present generation of aeroplanes would continue to be in operation for a number of years without any significant reduction in total noise exposure taking account of the expected growth of traffic. It was pointed out that the research and development work on the technical feasibility of reducing the noise emanating from present day turbojet aircraft by acoustically treating two installations of one particular type of turbo-fan engine of approximately 8500 kg (18,700 lb) thrust, had indicated that a reduction of noise to the extent of 7 to 15 PNdB during approach and 1 to 4 PNdB during take-off could be so achieved. It was therefore suggested that immediate action should be taken to lay down certain noise limits for the present generation of aeroplanes. It was further argued that if no action were taken to require retrofitting of the current generation of turbojet aeroplanes, the measures taken at present by the aerodrome authorities, such as imposing night curfews, might have a greater adverse effect on the aviation industry than would be caused by the cost of acoustically treating current aeroplanes.

3:3.2 There was a general agreement that in order to complement the effects of noise reduction from future subsonic turbojet aeroplanes as a result of the introduction of the noise certification Standards, it was also important to introduce a scheme for quietening the current generation of turbojet aeroplanes. However, it was admitted that there were a number of practical problems which needed to be faced. Firstly, there was no reliable indication at present as to what was technically feasible for different types of aeroplanes. Secondly, the basic initial cost of retrofitting the current fleet of turbojet aeroplanes (estimated at approximately 4000) might incur a

capital expense of between one and four billion* dollars. Thirdly, the benefits resulting might not be so very great as these aeroplanes would be gradually withdrawn and replaced by new types which should be much quieter than the present generation of turbojet aeroplanes. Also a number of practical problems would have to be faced, such as the setting up of requirements for different types of aeroplanes and power units, different ages of aeroplanes etc. In view of this, it would be impossible to lay down any specific noise certification requirements for such aeroplanes at present. It was also suggested that the total noise exposure could in addition be reduced by taking other action, such as by exercising a stricter control over land-use and the correct selection of sites for future aerodromes.

3:3.3 After considerable discussion, it was agreed that the problem of retrofitting the present fleet of turbojet aeroplanes was an urgent one. It was also agreed that it was technically feasible to reduce the noise levels of some of these aeroplanes by incorporation of suitable modifications. However, in view of the complexity of the problem the consensus was that it would be necessary first to make a careful study of the technical, economic and sociological aspects of the problem. Also that there be some legal aspects to be considered. It was therefore suggested that a suitable recommendation should be framed to urge ICAO to set up an appropriate body comprising the necessary expertise in the technical, economic and sociological fields and, as necessary, in the legal field to study the problem of retrofitting of the present fleet of turbojet aeroplanes and to make recommendations, as a matter of urgency, for a suitable scheme to be adopted uniformly by all Contracting States. This body should consider, among other things, the following aspects of the problem:

* One thousand million.

a) modifications of engines and nacelles to reduce noise below the present levels;

b) reliability of these modifications and cost of incorporation of such modifications;

c) cost-benefit studies of retrofit relative to other means of noise alleviation;

d) criteria and time schedule for retrofit action, taking into consideration the result of the cost-benefit studies and the progress of the relevant research and development work.

3:4 *Future work related to aircraft noise certification*

3:4.1 The Meeting had earlier agreed on the importance of developing expeditiously noise certification Standards for SST aircraft (see para. 3:2.3.1.2). The Meeting also noted that some work in this field had already been done in the three Contracting States engaged in the development of SST aircraft. It was considered that the result of this work could form a basis in developing detailed noise certification Standards for these aircraft. It was agreed that in any future work programme this task should be given a high priority second only to the problem of development of noise requirements for the existing subsonic turbojet aeroplanes.

3:4.2 It was also agreed that consideration should next be given to the development of noise certification Standards for types of aircraft, presently excluded from the applicability provisions of the noise certification Standards, such as light aircraft and STOL/VTOL aircraft, including helicopters. It was recognized however that in view of the limited work done in respect of reducing the noise emanating from these aircraft, this task could not be immediately accomplished. Furthermore, these aircraft do not pose a pressing problem. It was therefore accorded a lower priority than those detailed above.

Appendix G

3.4.3 There was some discussion in respect of requiring noise-reducing modifications to be applied to the developed versions, including the stretched versions and the production models of the existing subsonic turbojet aeroplanes. Although it could not be determined precisely whether the stretched versions should be treated as new aeroplanes or as development of the existing aeroplanes, there was a general agreement that these aeroplanes should eventually be brought within the scope of a noise certification scheme.

3:4.4 The noise certification Standards for the future subsonic turbojet aeroplanes developed by the Meeting were based on a reasonable application of both current technical knowledge and the economical implication of these Standards. With the development of new methods, as a result of both research-and-development work related to noise reduction undertaken in some States and in the light of experience that would be gained with the noise certificated aeroplanes, it was expressed that it might be possible to make the existing noise certification Standards more stringent. It was agreed, therefore, that

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reviews of noise certification Standards at periodic intervals should be made to determine the feasibility of updating the present noise certification Standards on the above basis.

3:4.5 Having outlined the various tasks that needed to be considered during future work on aircraft noise certification, the Meeting discussed the means by which expeditious results could be achieved. The Meeting came to the conclusion that the Council of ICAO should be requested to establish an appropriate body, comprising expertise in all the fields associated with aircraft noise problems, which should examine all matters that could not be adequately dealt with at this Meeting. In this con-

nexion, the Meeting noted with great satisfaction the useful work that had been done by the previously referred to small group of States,* which had agreed at the suggestion of the Council to form itself into an expert group specifically to prepare documentation dealing with aircraft noise certification for presentation, by States within the group, at the Special Noise Meeting (1969). As a result of this work, it had been possible to prepare noise certification Standards for subsonic turbojet aeroplanes and the opportunity was taken to express the Meeting's appreciation of that group. The consensus of the Meeting was however that, as the tasks required were now broader it might, in this instance, be preferable to establish a somewhat more widely representative body suitably enlarged to include expertise in the various fields associated with aircraft noise. This body could then provide the necessary information to enable future work related to aircraft noise certification to be dealt with by ICAO. It was stressed that this body should be requested to make recommendations, as a matter of urgency, on the various problems associated with noise certification, as soon as the feasibility and practicability of securing noise requirements for different classes of aircraft could be established, having due regard to the progress of aircraft noise abatement research, the costs involved and the benefit to be derived.

3:4.6 In view of the foregoing, the Meeting agreed to Recommendation 3/8 as follows:

RECOMMENDATION 3/8—

FUTURE WORK ON AIRCRAFT NOISE CERTIFICATION

That an appropriate body be established to examine, against the background of the discussions that took place at the 1969 Special

* Australia, France, Germany, Kingdom of the Netherlands, Japan, Sweden, U.K. and U.S.A.

Appendix G

Noise Meeting, matters that could not be fully dealt with at that Meeting, including in particular the following matters in order of priority:

a) development of noise requirements for:

i) existing subsonic turbojet aeroplanes;

ii) future production of such aeroplanes; and

iii) developed versions (to the extent not covered elsewhere) of such aeroplanes;

b) development of noise certification Standards for other classes of aircraft (such as SST, STOL/VTOL, light aircraft etc.) not covered by the existing noise certification Standards, commencing with SST aircraft;

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c) review at periodic intervals the feasibility of making existing noise certification Standards more stringent;

d) development of additional noise certification Standards based on the use of a reference ambient air temperature of 15°C (as a complement to those based on a reference temperature of 25°C);

and be invited to make recommendations on a) above as a matter of the utmost urgency, and to make recommendations on b) and c) above where the practicability of securing noise reductions for any class of aircraft is established, having regard to the progress of aircraft noise abatement research and the costs and benefits involved.

Appendix G

APPENDIX A

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AIRCRAFT NOISE CERTIFICATION

"PART ( )—ADMINISTRATION"

1. The Standards of this PART shall apply to all aircraft included in the classifications defined for noise certification purposes in subsequent Parts of this Annex, where such aircraft are engaged in international air navigation.

2. Noise certification shall be granted by the State of Registry of an aircraft on the basis of satisfactory evidence that the aircraft complies with requirements which are at least equal to the applicable Standards specified in this Annex.

NOTE:

The document attesting noise certification may take the form of a separate Noise Certificate or a suitable statement contained in another document approved by the State of Registry and required by that State to be carried in the aircraft.

3. The document attesting noise certification for an aircraft shall provide at least the following information:

(a) State of Registry;

(b) Manufacturer's serial number;

(c) Manufacturer's type and model designation;

(d) Statement of any additional modifications incorporated for the purpose of compliance with the applicable noise certification Standards;

(e) The maximum weights at which compliance with the applicable noise certification Standards has been demonstrated.

4. Contracting States shall recognize as valid a noise certification granted by another Contracting State provided that the requirements under which such certification was granted are at least equal to the applicable Standards specified in this Annex.

5. A Contracting State shall suspend or revoke the noise certification of an aircraft on its Register if the aircraft ceases to comply with the applicable noise Standards. The State of Registry shall not remove the suspension of a noise certification or grant a new noise certification unless the aircraft is found, on reassessment, to comply with the applicable noise Standards.

Appendix H *

Letter from the United States Secretary of State to the British Ambassador to the United States

MAY 6 1971

The Secretary of State presents his compliments to His Excellency the British Ambassador and has the honor to refer to the situation confronting Seaboard World Airlines, a United States flag carrier whose services between the United States and the United Kingdom have been severely impaired by the manner in which night jet movements are rationed at Heathrow Airport during the summer period (April 1 through October 31). The United States protests this action which denies Seaboard the "fair and equal opportunity" to operate services accorded by the United States-United Kingdom Air Transport Services Agreement of 1946. This denial is also inconsistent with United Kingdom obligations under the Convention on International Civil Aviation of 1944, which calls for equality of opportunity and non-discriminatory treatment. Details of the United States view have been informally presented in a paper to the Department of Trade and Industry.

According to commonly accepted commercial practices, all-cargo flights predominantly operate during the night hours. But the present method of allocation of night jet movements at Heathrow, which went into effect in January 1970, bases each carrier's allocation on its past record of day and night operations both for passengers and cargo and both for jet and non jet aircraft. This clearly benefits combination passenger and cargo carriers, especially the United Kingdom national carriers, whose entitlement to rationed night movements is enlarged by virtue of their extensive daytime landings and takeoffs.

*Renumbered Appendix I-H before the Second Circuit.

Appendix H

At the same time, it places Seaboard, an all-cargo carrier which has traditionally relied on night flights, at a distinct disadvantage.

As a result, Seaboard's night jet allocations at Heathrow have dropped sharply in 1970 and 1971. For 1971, it has been allocated only 69 night movements for the seven month period of night restrictions, which compares with 366 in 1967, 614 in 1968, and 458 in 1969. While seven carriers serving Heathrow, including BEA and BOAC, do not have to make a single change from their regular night requirements (based on past night operations), and another eight have to make generally modest adjustments, only Seaboard is asked to accept an allocation that amounts to only 6 percent of its regular night requirements. The low allocation given to Seaboard makes it impossible for that carrier to operate a viable United States-United Kingdom cargo operation, and denies it a fair opportunity to compete in that market.

The allocations at Heathrow are made by the London Airport Scheduling Committee which functions under the authority of the Department of Trade and Industry. Appeals by Seaboard to the Scheduling Committee since January 1970 when the present method of allocation went into effect have yielded no result. The Department of State has also called the matter to the attention of the Department of Trade and Industry. It is incumbent upon the British Government to take urgent action to ameliorate the conditions under which Seaboard must operate at Heathrow this year during the season which began on April 1, and to assure that the discriminatory effect of the rationing method will not recur in the future.

Department of State,

Washington,

Appendix I *

Excerpts from Action Against Aircraft Noise, Progress Report, Department of Trade and Industry, United Kingdom. 1973

Night jet movements

As the demand for air travel grows so restrictions on jet movements cause serious commercial disadvantages to the airlines. Nevertheless the Government has tightened the restriction on summer night jet movements at Heathrow by banning all normal summer night jet take-offs as from 1972. Further restrictions on summer night jet movements at Gatwick, Luton and Manchester have been announced for 1973, and the Department of Trade and Industry keeps in constant touch with the situation at any other airport where a serious night noise problem seems likely to develop. (At most UK airports which impose restrictions on night movements, night means 2330 hours to 0600 hours and summer means 1 April to 31 October inclusive.) Most UK airports impose restrictions on night training flights throughout the year.

• • •

Noise monitoring

At Heathrow, monitoring sites have been established for each departure route to ensure that noise levels in the first major built-up area overflown do not exceed specified limits. Thereafter, pilots must, subject to safety considerations, continue to climb at power settings which ensure a progressive reduction in the noise level along their route (see Figure 1). Infringements of the noise limits are taken up with the airlines concerned, but compliance during 1972 was over 98 per cent. Heathrow's noise limits (110 PNdB during the day, 102 PNdB by night) were set in 1958 in relation to large piston-engined aircraft (see Figure 2) and these same limits still apply to the bigger and more power-

*Renumbered Appendix I-I before the Second Circuit.

ful aircraft now flying. As a result some of the larger and noisier aircraft are unable to use certain runways. Sometimes, indeed, big aircraft needing to carry large supplies of fuel for operations on transatlantic and polar routes cannot comply with the limits at full load. They may thus have to reduce their fuel load, which in turn means a refuelling stop later. The cost of these stops to airlines is about £500 each time (£1,200 for a "Jumbo-Jet") in addition to delays in schedules and inconvenience to passengers.

APPENDIX II

DEPARTMENT OF TRANSPORTATION
UNITED STATES OF AMERICA

AVIATION NOISE ABATEMENT POLICY

November 18, 1976

OFFICE OF THE SECRETARY

FEDERAL AVIATION ADMINISTRATION

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PART ONE

INTRODUCTION AND SUMMARY OF AVIATION NOISE ABATEMENT POLICY

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I. INTRODUCTION

Aircraft noise is a significant annoyance for six to seven million Americans. The annoyance is particularly serious at many of our major airports, including those in large metropolitan areas from coast to coast. But noise constitutes a present or potential problem for residents living near many other airports across the nation, and as air travel increases it will become a serious problem at some of these other airports as well.

The aircraft noise issue became increasingly apparent in the early 1960's with the advent of jet aircraft and was soon magnified by the rapidly increasing number of commercial operations in the latter part of the decade. Because of its adverse effect on people, aircraft noise was recognized as a major constraint on the further development of the commercial aviation network, threatening to limit the construction and expansion of airports and access to them. Joint action by government and the private sector was taken to address it. The engine manufacturers and the federal government both engaged in extensive research into quieting jet engines. In 1969, Congress gave the Federal Aviation Administration ("FAA") the responsibility to regulate aircraft design and equipment for noise reduction purposes. The FAA then embarked upon a long-term program of controlling aircraft noise at its source.

A regulation promulgated in 1969 established noise standards for turbojet aircraft of new design effective December 1, 1969; an amendment in 1973 extended the same standards to all new aircraft of older design. The third step in the source noise control program is a regulation requiring compliance with noise standards by jet aircraft already in the fleet. Initially called the "retrofit" rule, it has been the subject of two major FAA rulemaking proposals, a notice of proposed rulemaking published in 1974 and a similar Environmental Protection Agency (EPA) proposal published in 1975. The FAA noise proposal for operating aircraft was the product of considerable study and analysis and was submitted by the Federal Aviation Administrator to the Secretary of Transportation in January because consultation with the Secretary is required by the Noise Control Act of 1972, and because the FAA concluded that some form of federal financing might be required to complete that program.

Intensive review of various proposals by the Secretary of Transportation, with the support of the FAA Administrator, led to a far-ranging analysis of the aircraft noise problem, alternative methods of dealing with it, and the economic consequences of imposing a rule applicable to operating aircraft as well as to newly certificated aircraft.

On October 21, 1976, President Ford advised us that, after considering the proposal we jointly presented to him, and the views of other interested agencies, including EPA, he had accepted our recommendation that action should be taken to extend current noise standards to domestic U.S. commercial airplanes in not more than eight years. He directed that the FAA promulgate its noise compliance rule not later than January 1, 1977. Our statement today announces that action, and the companion measures we believe are an integral part of a comprehensive aviation noise abatement policy.

The scope of the noise problem, the interrelationship and special responsibilities of the many parties concerned with it, and the general confusion and prevalent uncertainty about what it is possible to achieve and who is responsible have led us to conclude that the federal government should address the overall noise problem with a more comprehensive approach than mere promulgation of a new regulation. From recognition of the need for a comprehensive response to the noise problem, this policy statement will analyze the aviation noise problem, and delineate the shared responsibilities of those who must act to alleviate it - industry, government and private citizens.

Although progress has been made in the development of quieter aircraft, much remains to be accomplished. Aircraft noise, of course, cannot be completely eliminated unless we go back to the glider; its adverse effect on people can only be reduced. The complex division of legal authority and practical responsibility among airport proprietors, federal and local government agencies, air carriers, and manufacturers calls for a clearer understanding, first, of what is technologically and financially attainable and, second, of how each of these parties can and must perform those functions for which it is uniquely suited. Only if each party assumes responsibility and acts on the basis of complete cooperation and coordination will we achieve significant and measured progress in reducing the impact of aircraft noise on airport neighbors.

As the federal officials principally concerned with aviation noise, it is our duty to provide leadership in a national effort to reduce aircraft noise. The aviation noise abatement policy that follows represents our views about what action should be taken. Within the constraints of technology, productivity, and financing, it clarifies the responsibility of the federal government to reduce aircraft noise at its source, to promote safe operational procedures that abate the impact of noise on populated areas and to promote positive efforts to attain compatible land use in areas adjacent to airports. It deals realistically with the time that will be required to bring the current fleet of aircraft into compliance with noise level standards that are now technologically feasible and with the financial requirements necessary to make compliance possible.

Those who anticipate a complete federal solution to the aircraft noise problem misunderstand the need for federal, local and private interaction. The primary obligation to address the airport noise problem always has been and remains a local responsibility. Consequently, we have also set forth what we believe to be the legal and proper responsibilities of the airport proprietors, air carriers and other aircraft operators, aeronautical manufacturers, state and local governments, and private citizens. The full benefit of a federal plan of action will be realized only if complementary action is taken by all these participants.

Local capability to plan and take action will be enhanced by a clearer understanding of what the federal government intends to do. As the federal government reduces cumulative noise exposure by controlling the source of noise, so must local governments and airport proprietors, with federal financial assistance in some instances, acquire land and assure compatible land use in areas surrounding the airport in order to confine severe noise exposure within the boundaries of the airport and to minimize the impact of noise beyond those boundaries.

Because of the complexity of the noise problem, we have set forth the following synopsis of our Aviation Noise Abatement Policy which summarizes the key responsibilities of each participant and highlights the federal action program. The analysis of the noise and financing problems that led to the formulation of this policy, the legal foundation upon which the policy rests, and the specific explanation of how certain timing, noise levels and policy conclusions were reached are set forth in Part Two. Accordingly, we invite your attention to Part Two and the underlying rationale that we believe will clarify and support the conclusions set forth in the following section.

John L. McLucas
The Federal Aviation Administrator

William T. Coleman, Jr.
The Secretary of Transportation

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II. AVIATION NOISE ABATEMENT POLICY

A. Basic Policy Principles

- Because aircraft noise adversely affects a significant portion of the nation's population, a nationwide commitment, involving federal, local and private resources, is required to reduce the impact of aviation noise on the people who live in areas surrounding airports.

- Public understanding is essential to an effective program to reduce aircraft noise so that we do not raise the expectations of airport neighbors for noise reductions beyond the levels which technology and reasonable cost-effectiveness make possible.

- Each of the participants in the noise abatement effort - the airport users, aircraft manufacturers, the airport proprietors, federal, state and local governments, and residents in communities surrounding airports - must take specific steps that are essential in reducing the number of people adversely affected by noise and the severity of the effect on all people.

- Planning and acting in coordination, each of these parties should move toward the goal of confining severe aircraft noise exposure levels around U.S. airports to the areas included within the airport boundary or over which the airport has a legal interest, and of reducing substantially the number and extent of areas receiving noise exposure levels that interfere with human activity.

B. Authorities and Responsibilities Under the Policy

The Federal Government has the authority and responsibility to control aircraft noise by the regulation of source emissions, by flight operational procedures, and by management of the air traffic control system and navigable airspace in ways that minimize noise impact on residential areas, consistent with the highest standards of safety. The federal government also provides financial and technical assistance to airport proprietors for noise reduction planning and abatement activities and, working with the private sector, conducts continuing research into noise abatement technology.

- Airport Proprietors are primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area. Such actions include optimal site location, improvements in airport design, noise abatement ground procedures, land acquisition, and restrictions on airport use that do not unjustly discriminate against any user, impede the federal interest in safety and management of the air navigation system, or unreasonably interfere with interstate or foreign commerce.

- State and Local Governments and Planning Agencies must provide for land use planning and development, zoning, and housing regulation that will limit the uses of land near airports to purposes compatible with airport operations.

- The Air Carriers are responsible for retirement, replacement, or retrofit of older jets that do not meet federal noise level standards, and for scheduling and flying airplanes in a way that minimizes the impact of noise on people.

- Air Travelers and Shippers generally should bear the cost of noise reduction, consistent with established federal economic and environmental policy that the adverse environmental consequences of a service or product should be reflected in its price.

- Residents and Prospective Residents in areas surrounding airports should seek to understand the noise problem and what steps can be taken to minimize its effect on people. Individual and community responses to aircraft noise differ substantially and, for some individuals, a reduced level of noise may not eliminate the annoyance or irritation. Prospective residents of areas impacted by airport noise thus should be aware of the effect of noise on their quality of life and act accordingly.

C. Federal Action Plan to Implement These Policies.

1. Aircraft Source Noise Regulation

a. Currently Operating Aircraft

The Federal Aviation Administration will promulgate a rule requiring that subsonic jet airplanes with maximum weight in excess of 75,000 pounds that do not meet the present Federal Aviation Regulations Part 36 noise levels must be retired from the fleet or modified ("retrofitted") to meet those levels in accordance with the following schedule. To bring about the earliest reduction of noise levels possible, the phased-in compliance deadlines for each aircraft type have been established on the basis of what is technologically practicable and economically reasonable. The deadlines are:

747s within six years, with one-half to be completed within four years;

727s, 737s, DC-9, BAC 1-11s within six years, with one-half to be completed within four years; and

720s, 707s, DC-8s, CV-990s within eight years, with one-quarter to be completed within four years, and one-half to be completed within six years.*

These time periods will start to run with the issuance of appropriate regulations to be effective January 1, 1977. In accordance with such procedures as are authorized by law and FAA regulations, persons subject to these regulations may petition for an exemption. In evaluating petitions for an exemption, the FAA will consider the economic ability of the petitioner to meet the regulatory timetable and whether the petitioner is able to operate the airplanes for which an exemption is sought into airports where a significant noise problem does not exist. As a matter of policy, it is our view that such exemptions should not in any event extend to more than one-third of the JT8D powered airplanes in an operator's fleet.

In conjunction with the issuance of the Part 36 compliance regulation, the United States will work through the International Civil Aviation Organization to reach agreement with other nations on means to abate aircraft noise. If agreement is not reached in three years, it is the intention of the federal government to require aircraft flown by carriers of other countries to meet U.S. established noise levels at the end of five additional years. For the time being, aircraft operated by foreign carriers and that portion of the fleets of U.S. air carriers used in international service will not be covered by the noise regulations issued pursuant to this statement.

b. Future Design Aircraft

The FAA will complete, by March 1, 1977, its consideration of new, more stringent noise standards for new aircraft designs that reflect recent advances in noise suppression technology and are technologically practicable, economically reasonable, and appropriate for the particular type of aircraft. These regulations will be applicable to subsonic aircraft developed for the replacement of the old four-engine jets and to airplanes type certificated after the effective date of the regulation.

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* In the establishment of the eight year deadline for the older four-engine jets, we considered, for example, the time required to develop and certificate for production a retrofit kit for the 707 (two years) and the DC-8 (36 months) and the time required to produce and install enough kits to bring these planes into compliance (there are currently over 500 in operation).

c. Supersonic Aircraft

Using information that is now available on a continuing basis from the Concorde demonstration, the FAA, not later than thirty days after the conclusion of the sixteen month demonstration periods, will act to promulgate a noise rule applicable to supersonic aircraft that is necessary to protect the public health and welfare and that is consistent with the statutory requirement that the Administrator consider technological practicability, economic reasonableness, and appropriateness to aircraft type.

2. Operating Procedures

The FAA has evaluated a number of concepts for aircraft operating procedures designed to abate noise. The FAA has taken regulatory action this week to maximize the noise reduction benefits of new aircraft and retrofitted aircraft, consistent with the highest degree of safety. Additional analysis and evaluation is underway which is expected to lead to future regulatory action.

3. Airport Development Aid Program

Under the new authority granted in the 1976 Amendments to the Airport and Airway Development Act, the FAA will establish a high priority for the allocation of discretionary Airport and Airway Trust Funds for airport land acquisition to ensure compatible use of land near airports, the purchase of noise suppressant equipment, the construction of physical barriers and other noise reduction activities.

The Department of Transportation, in appropriate cases, will encourage the development of new airports to replace some of the older airports in areas with large populations adversely affected by noise. In the development of new airports, federal financing will be conditioned on effective noise abatement planning. Federal funding for new airport development and for airport expansion and improvement will require documentation that the proprietor is taking all reasonable steps to ensure that the use of land areas exposed to serious levels of noise is restricted to uses compatible with airport operations projected for the foreseeable future.

The Administration will request the Congress to amend further the Airport and Airway Development Act to include among airport proprietor activities eligible for federal-aid funding the acquisition, installation and operation of airport noise monitoring equipment. Use of such equipment is vital to

assist airport proprietors in quantifying noise exposure, identifying specific airplanes and operators that are major contributors to community noise, and developing programs to reduce aircraft noise exposure.

4. Airport Noise Policy

To bring about further relief from excessive aircraft noise, airport proprietors are encouraged to develop aggressive noise abatement programs for their airports. The FAA will assist proprietors in attaining their noise abatement goals and will advise them on how their proposed plans affect the overall air transportation system. The FAA will accept preliminary proposals from airport sponsors for comprehensive noise abatement plans and will fund a select number of innovative noise abatement model plans and demonstrations. In addition, the FAA will encourage noise abatement plans from airport proprietors in conjunction with both applications for major airport development grants and proposals to establish use restrictions, such as curfews or scheduling and equipment restrictions. The FAA will advise airport operators whether proposed use restrictions are unjustly disciminatory or place an undue burden on interstate or foreign commerce because of their impact on the national air transportation system. Where necessary, the FAA will seek adjudication of the constitutional issues involved if it believes that a use restriction established at an airport is unjustly discriminatory or creates an undue burden on interstate or foreign air commerce.

D. Air Carrier Action Plan

1. Aircraft Compliance

Under the federal rule described above, the older, noisier four-engine jets using the JT3D and similar engines (707s, DC-8s, CV-990s) must be modified to meet Part 36 noise levels or they must be retired from operation within eight years. Many of the four-engine jets are old and relatively inefficient to operate. After weighing the advantages of modification and replacement, the Secretary of Transportation and the Administrator of the Federal Aviation Administration have concluded that it would be in the public interest if most of these aircraft were replaced by new airplanes, particularly by new airplanes that incorporate new technologies currently under development. Replacement would reduce further noise and pollution emissions levels. In addition, replacement would increase energy efficiency, accelerate introduction of advanced safety and design technologies, increase employment opportunities, improve service for the air traveller, and improve prospects for exports by the American aerospace industry.

2. Financing

To ensure that the air carriers can meet the new aircraft noise standards within the deadlines established by regulation, President Ford directed me, as Secretary of Transportation, to hold a public hearing on December 1, 1976, to determine whether any additional financing arrangements may be necessary. Further details on this hearing and the issues to be addressed are set forth in separate documentation.

E. Local Actions

While federal action will form the basis of our program, substantial local action will be necessary to complement the noise reduction actions of the federal government and air carriers. Since a federal program would be significantly less effective without commensurate local actions, we have delineated those actions we believe local authorities should take.

The FAA will encourage airport proprietors, who are legally responsible for the effect of aircraft noise on the surrounding community, to assess their particular noise problem and, where local authorities determine that there is a significant problem, to develop an action plan to reduce the impact of noise. That action plan should include a program to ensure maximum land use compatibility with airport operations both by the acquisition of easements or other rights in the use of land or airspace and by encouraging local governments to adopt and enforce zoning or other land use controls. It should also address other actions that may be taken, such as the establishment of a formal noise abatement runway system, control of ground operations, and preferential arrival and departure routes. The proprietor may wish to propose to the FAA special landing and takeoff procedures to deal with any unique conditions around his airport.

In addition, state and local governments with jurisdiction over property adjacent to airports must take action of their own, preferably in cooperation with the local airport proprietor. State and local governments are directly and uniquely responsible for ensuring that land use planning and zoning and land development activities in areas surrounding airports are consistent with the objective of ensuring land use that is compatible with present and projected aircraft noise exposure in the area. Construction standards for new buildings should ensure appropriate insulation from aircraft noise, and programs to insulate existing public and residential buildings should be advanced where needed.

State and local governments also should require that appropriate notice of airport noise exposure be provided to the purchasers of real estate and to prospective residents in areas near airports to ensure awareness of the nature of the airport environs.

F. Concluding Note

With realistic public appreciation for the complexity of the task to be performed and with full and open communication and cooperation among the participants, the actions that each of us take separately pursuant to this policy will contribute toward significant and recognizable progress in the reduction of the adverse effect of aircraft noise on airport neighbors.

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PART TWO

ANALYSIS OF THE NOISE PROBLEM, LEGAL FRAMEWORK, AND DESCRIPTION OF THE FEDERAL ACTION PROGRAM

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I. STATEMENT OF THE PROBLEM

In determining what action can and should be taken at the federal and local levels and in the private sector to reduce the adverse effect of excessive aircraft noise, a full understanding of this multidimensional problem is essential. In this part, we will explain the underlying rationale that supports the conclusions set forth in our Aviation Noise Abatement Policy and the federal action program to implement it. In describing the noise problem, we will explain first the technical framework for measuring the noise problem, how it affects people and how they react to it, how many people are subjected to excessive noise and where they live, and how actions to reduce noise affect interstate commerce. Because progress in noise reduction is heavily dependent upon the financial ability of airlines to modify or replace their old, noisy airplanes and on the ability of manufacturers to design, produce, and sell less noisy airplanes, we also will consider the financial condition of the airlines and the impact of proposed actions on the aerospace industry.

The responsibilities of federal and local governments, airport proprietors, and industry in responding to the noise problem are defined in large measure by statutory and case law. Accordingly, the legal framework set forth in this part establishes the foundation upon which the federal program must be constructed. Finally, the federal response summarized in this policy is described in greater detail in terms of the precise nature of the noise problem it is designed to address and the financial and technological constraints within which progress must be made.

A. The Noise Problem

1. How Noise is Described

People's reactions to noise differ widely. It is difficult, therefore, to derive a simple mathematical formula that accurately represents human reaction to noise ananoyance. For example, it remains uncertain whether people, in reacting to aircraft noise, are more annoyed by the number of aircraft noise events or the noise levels of individual events. To help measure, quantify and understand the effects of noise on people, there has been a proliferation of approaches, the acronyms of which threaten to challenge the supremacy of the federal bureaucracy in this regard. Rational public discourse is not greatly aided by a debate over the relative merits of expressing noise impact in terms of dB, dBA, dBD, PNL, EPNL, EPNdB, SEL, SENEL, CNR, NEF, CNEL, ASDS, Ldn, and Leq. In this policy statement, we have relied primarily on the two most common measurements of noise: noise generated by a single event (expressed in EPNdB, usually at the Part 36 measuring points) and cumulative noise exposure (expressed in Noise Exposure Forecast or NEF).

Human response to single-event jet aircraft noise is best represented in terms of Effective Perceived Noise Level, expressed in units of EPNdB. This unit of perceived noise takes into account the actual sound energy received by a listener, the ear's response to that sound energy, the added annoyance of any pure tones or "screeches" in the noise, and the duration of the noise. In any discussion of aircraft noise abatement, a key consideration is the difference in noise level which a listener is able to perceive and find meaningful, in terms of both the single event and the cumulative exposure. Few humans can detect differences between single events of aircraft noise of less than about 5 EPNdB. However, an increase of 10 EPNdB is usually perceived as a doubling in loudness.

The Part 36 measuring points are standardized locations from which aircraft noise is measured for certification purposes. Such measurements are specified at three points: one under the approach path,* one under the takeoff path.** and one to the side of the runway at the point of maximum noise during takeoff.*** Although the Part 36 values do not give a complete picture of the total noise impact at an airport, they do provide a standardized method of measuring aircraft noise, and are useful in comparing noise levels of different aircraft.

In general, if noise events, such as aircraft flyovers, are infrequent, the peak noise level of the individual events will probably determine individual reactions to that noise. If the noise events are relatively continuous or repetitive, however, the total noise "dose" or cumulative noise exposure becomes a more important factor in people's reactions to aircraft noise. Noise Exposure Forecast (NEF) provides a measure of the total aircraft-generated noise energy received at locations near an airport during a typical 24-hour period. The NEF value at a given point near an airport is calculated by summing the noise energy received at that point from all of the aircraft operating into and out of that airport during a day, with an added penalty for nighttime noise (flights after 10 p.m.). Points of equal NEF value are then joined to form contours of equal noise exposure. Calculation of these values requires knowledge of the number and type of aircraft operating, the noise characteristics of each aircraft, the flight paths they follow, the time of day they fly, and the manner in which they are operated (for example, power settings during takeoff and landing).

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* One nautical mile from the runway threshold.

** 3.5 nautical miles from the start of the takeoff roll.

*** 0.35 nautical miles to the side of the runway for four-engine aircraft, 0.25 nautical miles for two- and three-engine aircraft.

The NEF procedure has been developed over the last decade for land use planning around airports as the number of jet aircraft has increased and their noise has become more of an annoyance. It is particularly meaningful in measuring the overall impact that residents around busy airports might experience, and research into human reaction to aircraft noise indicates that cumulative noise exposure is the most useful measure of public reaction to aircraft noise.*

*References for Cumulative Measure Support

1. Tracor Inc.: Community Reaction to Airport Noise - Vol. I, NASA CR 1761, Vol. II NASA CR 111 316, September 1970.

2. Connor, William and Patterson, Harrold: Community Reaction to Aircraft Noise Around Smaller City Airports. NAS CR 2104, 1972.

3. Galloway, W. and Bishop, D.E.: Noise Exposure Forecasts: Evolution, Evaluation, Extensions and Land Use Interpretations. FAA Report No. FAA-NO-70-9, August 1970.

4. McKennell, A.C.: Aircraft Noise Annoyance Around London (Heathrow) Airport. S.S. 337, Central Office of Information, 1963.

5. MIL Research Ltd.: Second Survey of Aircraft Noise Annoyance Around London (Heathrow) Airport. Office of Population Censuses and Surveys, Social Surveys Division. HMSO (London), 1971.

In assessing community reaction to aircraft noise exposure, the following interpretations of NEF values are often used:

Less than NEF 30	Essentially no complaints expected; noise may interfere with community activities.
NEF 30 to NEF 40	Individuals may complain; group action possible.
Greater than NEF 40	Repeated vigorous complaints expected; group action probable.

A reduction of one NEF unit is equivalent to a reduction of about two percent in the number of people highly annoyed and equal to a reduction of about 14 percent in the area exposed to the same level of noise exposure.* A difference in noise level below 5 EPNdB may not be significant as a single event, but if there are frequent occurrences the cumulative effect of that difference may be substantial, and the change in NEF value would reflect this.

The NEF method has been adopted by the Department of Housing and Urban Development. It will not guarantee mortgages on properties within NEF 40 and normally considers properties within NEF 30 unacceptable. NEF and other descriptors of cumulative noise exposure** are useful in determing the effect of federal noise control activity on airport communities and in commensurate local land use development and planning.

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* The relationship between NEF reduction and land area reduction is logarithmic - i.e., a 50 percent reduction in land area is approximately equivalent to a 4.5 NEF unit reduction, while a 25 percent reduction in land area is approximately equal to a 2.0 NEF unit reduction.

** The Environmental Protection Agency has recommended that cumulative noise exposure be expressed by a measure called Day/Night Average Noise Level (Ldn). The equivalent values are:

NEF 30 = Ldn 65; NEF 40 = Ldn 75

2. How Noise Affects People

Aircraft noise disturbs the normal activities of airport neighbors--their conversation, sleep, and relaxation--and degrades their quality of life. Depending on the use of land contiguous to an airport noise may also affect education, health services, and other public activities.

Although there may be indirect and subtle social and psychological harms, aircraft noise is predominantly an annoyance problem. It does not present any direct physical health danger to the vast majority of people exposed.

3. Whom Does Noise Affect and Where Do They Live

Approximately six million U.S. citizens currently reside on 900,000 acres of land exposed to levels of aircraft noise that create a significant annoyance for most residents.* Of this number, approximately 600,000 citizens reside within areas that are severely impacted by aircraft noise; that is, areas in excess of NEF 40.

The subjective reactions of individuals to aircraft noise vary substantially.** These differences become increasingly apparent in the comparison of noise problems surrounding specific airports, taking into consideration the number and kind of local complaints about noise, the political pressures on the airport operator to take unilateral action to restrict use of the airport, and the environmental and social contexts--climate, lifestyles, community concern--in which noise is perceived.

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* Over NEF 30.

** The 1973 Annual Housing Survey conducted by the Bureau of the Census for the Department of Housing and Urban Development, indicated that of those surveyed:

> 20.2 percent experienced noise from airplane activity in the vicinity of their home. Of those experiencing noise, 34.2 percent considered the noise to be disturbing, harmful or dangerous; 6.3 percent felt airplane noise to be so objectionable that the household would like to move from the neighborhood.

In some communities, people's reaction to aircraft noise is increasingly being expressed in the courtroom where homeowners are receiving awards for nuisance and for diminution of property value (inverse condemnation). Over the past five years, airport proprietors have paid out over $25,000,000 in legal judgments or settlements in noise-related suits and have spent over $3,000,000 in legal fees, expert testimony and similar defense efforts.

The absence of lawsuits in some severely impacted areas and the recent occurrence of the most significant court precedents cause some observers to consider the pending suits to be merely the "tip of the iceberg," with substantial potential liabilities yet to arise. Others consider the concentration of lawsuits in certain areas to be an indication of the diversity in community response to aircraft noise, concluding that noise is not yet perceived as a substantial problem around many airports.

Partly as a reaction to such lawsuits, some airport proprietors have acquired substantial residential areas near their boundaries. The largest such programs have been undertaken by Seattle-Tacoma International and Los Angeles International Airports. Los Angeles alone has spent over $130 million to purchase private residences and plans to spend $21 million on sound-proofing schools and other public buildings near the airport.

Because the magnitude of the noise problem at any particular airport is a function of many factors, there is not any single criterion that defines a "noisy" airport. Depending on which criteria are used, the number of airports that are categorized as: "noisy", "noise sensitive", "noise problem", or "impacted by excessive noise", will vary. For example, the Air Transport Association (ATA) has identified 26 airports as "noise sensitive." On the other hand, the Airport Operators Council International has indicated that all airports receiving jet air carrier service now are or soon will be "noise impacted." By any definition, however, it is clear that an acute noise problem exists at many airports located in metropolitan areas.

Based on an analysis of citizen and Congressional complaints, the imposition of airport use restrictions, litigation and the number of people affected, the FAA has identified 100 airports where noise is in varying degrees an issue. A 1974 DOT study

of 23 major U.S. airports identified eight airports that have neighboring populations of over 25,000 residing within the NEF 40 contour (extremely serious problem), and 13 airports with at least 100,000 residing within the NEF 30 contours (considerable annoyance).* For the 23 airports surveyed, five million people live within NEF 30 and a half a million within NEF 40. Clearly the vast majority of people exposed to serious levels of noise live near the major metropolitan airports.** The following chart tabulates the number of people exposed to serious aircraft noise within the NEF 30 and 40 contours around the 23 airports included in DOT's study.

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* These airports, in the order of the number of people affected, are: LaGuardia, O'Hare, Kennedy, Newark, Boston, Los Angeles, Miami, Denver, Cleveland, San Francisco, Seattle, Buffalo, and St. Louis.

** "Airport Noise Reduction Forecast," Report DOT-TST-75-3, October 1974.

EXTENT OF NOISE PROBLEM AT 23 MAJOR AIRPORTS

	Airport	1972 Number of People ** (1000) NEF 30	NEF 40	Court-suits	Restric-tions
1.	*Atlanta	99.8	27.0	Yes	
2.	*Boston	431.3	32	Yes	
3.	*Buffalo	113.8	9.7		
4.	Chicago-Midway	38.5	1.8		
5.	*Chicago-O'Hare	771.7	66.6		
6.	Cleveland	128.7	11.2		
7.	*Denver	180.3	28.3		
8.	Dulles	3.5	0		
9.	*J.F. Kennedy	507.3	111.5		
10.	*LaGuardia	1057.0	17.1		
11.	*Los Angeles	292.4	51.1	Yes	
12.	*Miami	260.0	29.7	Yes	
13.	*Minneapolis-St. Paul	96.7	8.8	Yes	Yes
14.	*Newark	431.9	27.5		
15.	New Orleans	32.5	8.9	Yes	
16.	Philadelphia	76.9	0.3		
17.	*Phoenix	20.5	6.2		
18.	Portland	1.2	0.3	Yes	Yes
19.	*San Diego	77.3	24.0	Yes	
20.	*San Francisco	124.1	11.4		
21.	*Seattle	123.2	17.3	Yes	Yes
22.	St. Louis	100.0	8.5	Yes	
23.	*Washington National	24.4	2.0	Yes	Yes
	TOTAL	5.0M	0.5M		
	All other airports	1.1M	.1M		
	GRAND TOTAL	6.1M	0.6M		

* Identified by Air Transport Association as being "noise sensitive." Other airports on the current ATA list but not included in the study are: Detroit, Honolulu, Memphis, Las Vegas, Tampa, Ft. Lauderdale, San Juan, Oakland, and San Jose.

** Estimated from 1970 Census data

In response to public opposition to noise, some airports have imposed or are considering various use restrictions.* These measures include curfews, restrictions on the use of certain equipment, and limitations on operations. Such restrictions may have a substantial effect on interstate commerce and on the air navigation system.

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* Major examples of completed or proposed actions by airport owners to reduce noise levels by restricting the use of the airport are:

- Night Time Operating Restrictions - Lindbergh Field in San Diego, California; Pearl Harbor, Oahu; Washington National
- Total Jet Ban - Santa Monica Municipal Airport, California; Watertown Municipal Airport, Wisconsin
- Exclude non-Part 36 Jet Aircraft - Los Angeles International, Logan International, Boston
- Limit Number of Aircraft Operations - Stewart Airport, N.Y.
- Exclude Particular Types of Aircraft - Los Angeles International and Logan International have prohibited SSTs, JFK International is considering a similar ban
- Limit number of nightime operations - Minneapolis-St. Paul
- Operational Noise Limits - JFK International
- Displaced Threshold - Logan International and many others
- Noise Preferential Runways - Atlanta, Miami, Tampa, San Juan, Boston-Logan, Hartford-Bradley, O'Hare, Midway, Cleveland Hopkins, Detroit-Wayne County, Minneapolis-St. Paul, Moisant-New Orleans, Denver, Pittsburgh, LaGuardia, Newark, Los Angeles, San Franciso and others.

In some of the above cases, the restrictions have been developed voluntarily through operator/users agreements, while in others they have been imposed unilaterally by the airport proprietor.

Curfews at large, medium and small hubs could have very serious effects. New York City is an illustration:

- Air cargo shipments by weight remain at a relatively constant level for 24 hours at Newark and Kennedy. Accordingly, restrictions on night operations would severely disrupt freight shipment and handling. During May 1974, 37 percent of the total New York air cargo was transported between 10 p.m. and 7 a.m. local time. With a nationwide curfew applying to the same time period, the foreclosure of freight traffic to New York would extend to the hours during which 49 percent of the New York cargo moves.

- A curfew's impact on mail shipments would also be significant. The movement of mail between 10 p.m. and 7 a.m. at New York amounted to 23 percent of the daily air transported mail for the sample studied. A nationwide curfew would curtail flights for the hours in which 35 percent of the New York mail moves.

- Five to 13 percent of all passenger movements would be affected by similar New York and nationwide curfews. Much of the night passenger travel makes use of the reduced night coach fare structure enabling those with less financial resources to travel by air.

Other disbenefits are also likely if curfews are widely adopted. A substantial number of airplane operations might have to be shifted to earlier hours, which, while eliminating noise at night, would result in congestion and delays and an increase in the noise exposure during daylight and evening hours. Airlines would require more aircraft, more expensively operated, to overcome positioning problems if even one or two major hubs were curfewed. Time zone differences would cause additional scheduling problems. A curfew at O'Hare, for example, would cause a major restructuring of most of the domestic air transportation system.

4. <u>The Source of Aircraft Noise: Composition of the Fleet</u>

Some have argued that normal attrition will eventually take care of the aircraft noise problem, as the older, noisier planes are phased out of the fleet. The evidence indicates, however, that unless federal action is taken, the problem of airport noise will remain and, with increasing operations occurring at more airports, will be exacerbated. At the end of 1975, only 494 of the 2,148 jet airplanes in the U.S. air carrier fleet (about 23 percent) complied with the noise levels of Part 36. It bears repeating that the 77 percent of the fleet that exceed Part 36 levels were not required to meet those standards since they were produced prior to the effective date

of Part 36. Of the 1,654 aircraft in the fleet that do not meet Part 36 noise levels, 523 or 30 percent are the noisiest, four-engine models (Boeing 707s and 720s, Douglas DC-8s). Assuming normal attrition, the FAA projects that in 1990 48 percent of the air carrier fleet still will not meet Part 36.*

Since 1972, there has been a reduction in cumulative aircraft noise exposure around airports due in part to the introduction of new quieter jet aircraft and in part to the slowed rate of increase in passenger growth. Because of forecasted aviation growth, the airport noise problem is expected to increase in the future despite the introduction of quieter aircraft. Between 1975 and 1990, annual air carrier operations are estimated to increase from 10 million to 16 million, creating additional noise exposure that, without federal action, could more than offset the reduction in noise levels resulting from the replacement of the older airplanes by newer, quieter models. The major reason why progress in the replacement of older airplanes has been slow is the financial condition of the air carrier industry, to which we now turn.

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* Details concerning the aircraft currently operating that do not meet Part 36 noise levels and an FAA projection of the non-Part 36 aircraft that will remain in commercial service in 1984 is set forth in the Environmental Impact Statement issued in conjunction with the Part 36 compliance regulation.

B. The Financial Problem

1. Ability of Airlines to Finance Aircraft Replacement

As older noisier airplanes are modified or replaced with new planes that meet or better Part 36 standards, the cumulative noise exposure around major airports will be reduced. The degree and speed with which this occurs depends upon the financial capability of the air carriers to modify or replace their older airplanes. Since additional noise reduction and other benefits accrue from replacement rather than retrofit of these planes, replacement appears to be a more desirable goal. But since replacement requires a much greater capital outlay than retrofit, the forecasted economic environment for the airline industry becomes doubly important.

In recent years many major airlines have experienced very serious difficulty in obtaining from private capital markets the financing necessary for equipment and other needs. Some have found themselves short even of working capital to continue operations. Between 1970 and 1975, the trunk carriers spent $14.6 billion on capital needs: $8.7 billion for aircraft, equipment and property; $1.7 billion for leases of aircraft and engines; and most of the rest for debt service. The sources of this financing were mainly depreciation ($5 billion to $7 billion) and new long term debt ($4 billion), with earnings contributing only about $400 million. Equity financing was insignificant in this period, and low earnings and existing high debt levels forced some carriers to lease rather than purchase new aircraft. In addition, because of their recent earnings records, conventional sources of debt financing also have been effectively foreclosed to some carriers. Insurance companies and banks have been unwilling or unable to make further financing commitments and in recent months have stated publicly that, until the airlines' financial situation is sufficiently improved, new loans will not be forthcoming. In this financially strained economic environment, some carriers have been forced to resort to existing revolving credit arrangements to raise working capital.

The 1974/1975 period was particularly difficult for the industry. The sudden and substantial increase in fuel prices that began in 1974, accompanied by inflation in other cost categories, forced carriers to raise fares sharply. This coincided, unfortunately,

with the economic recession of 1974-75 when demand was already softening, and traffic levels were driven down even further. Moreover, many airlines in the late 1960s had purchased equipment to meet a predicted demand growth that never occurred, leaving them for a time with substantial excess capacity. The airlines' financial problems were exacerbated by the existing economic regulatory system which does not normally allow for timely fare increases, and denies airlines the pricing and management freedom available to other industries.

The airline industry's financial performance has been showing steady improvement since the end of the recession, however, and prospects for increased earnings over the next few years are good. Traffic growth is expected to resume, though at a long-term rate about equal to GNP growth, in contrast to more rapid growth rates in the past. Since, at present, the airlines have relatively few new aircraft on order, any near term traffic growth will be accommodated largely through increases in aircraft productivity. Load factors are likely to increase, earnings should remain fairly stable at a relatively high level, and new capital needs should be relatively modest until 1980.

After 1980, however, traffic growth will begin to press against the fleet's capacity, and airlines will begin to require new capital to finance the replacement of aging aircraft and to meet the growth demand. Leaving aside the new noise requirements, the Department estimates that between 1976 and 1985 the trunk carriers will need from 700 to 800 new aircraft and will require between $22 and $30 billion dollars to finance this acquisition (based on estimates by Government and private sector financial analysts). About $6 billion will be needed for debt repayment and other uses. A mid-range estimate of total capital needs, therefore, would be $32 billion.

Depreciation and sales of used aircraft can be expected to generate about $15 billion of this amount, leaving $17 billion to be financed through earnings and external sources. If earnings in the period were to rise to $6 billion which implies a 9 percent return on equity, as contrasted with the average 2.8 percent return of the past five years, external financing needs would be $11 billion. The airlines would probably be able to obtain this financing from conventional financial sources. The following table summarizes these estimates:

Sources and Uses of Funds (Mid-range Estimate)

Uses of Funds:	($ Billions)
Property, Plant and Equipment	$26
Debt Repayment and Other	6
	$32
Source of Funds:	
Depreciation and Sales of Used Aircraft	$15
Amount Required from Earnings and External Sources	$17
Earnings Assumption	6
External Financing Requirement	$11

It is unlikely that capital needs can be met in this manner, however, if the industry does not achieve $6 billion in earnings by the end of 1985. As indicated, this level of earnings implies an average annual return on equity three times as large as that earned over the last five years. It also assumes no unexpected negative developments, such as another recession or substantial new increases in fuel or other costs. These or other events would materially reduce the ability of the industry to earn a 9 percent return on equity.*

Under one scenario for meeting the new noise abatement regulation schedule, the "regular" 707s and DC-8s are retired and replaced with a new technology airplane and the stretched DC-8s and the remainder of the noncomplying fleet are retrofitted. This would increase the trunk carriers' capital requirements to 1985 by between $5.5 and $7.6 billion, an increase of 20 to 27 percent more than the amount required as discussed above. An incremental capital requirement of this magnitude would appear to be clearly beyond the industry's ability to finance, given the other financing burdens they will face in the early 1980s.

* It must be noted that the above estimates of financial needs and sources are predicated on industry-wide estimates. Carriers that are in relatively inferior financial position will have greater difficulty in obtaining needed funds than will other carriers.

We believe passage of regulatory reform bill (the proposed Aviation Act of 1977) to be reintroduced by the Administration in early 1977 will help the airlines with their overall financing problem. If the carriers had been operating under the regulatory environment envisioned in the proposed legislation they would not face major difficulty in adjusting prices to anticipate needed capital investment requirements and in obtaining the needed financing for the rule. Under the cost-based guidelines now used by the Civil Aeronautics Board in evaluating requests for fare increases, the capital outlay for new equipment, about a third of which is made before the aircraft is delivered, cannot be recovered through fare increases until the aircraft is delivered and in operation. Thus if today's economic regulatory environment continues, it may be impossible for the industry to commit to the manufacturers the substantial amount of cash necessary to get a new technology aircraft into production and delivered soon enough to replace the DC-8/707 fleet by the end of 1984.* Complicating the problem is the fact that a number of carriers are significantly weaker than others and it is these carriers who are the owners of large numbers of noisy aircraft and thus face some of the largest financing requirements.

It is clear that over the period in which the noisy aircraft must be modified or replaced, timely passage of the Aviation Act of 1977 should make a large difference in the carriers' ability to finance new aircraft purchases. However, this very desirable change in regulatory policy would not go into effect for at least a year, and if, as expected, its provisions are phased to allow amply time for adjustment to the new operating environment, its full effect will not be felt for several years.

2. The Aerospace Industry

Lasting noise reduction benefits will be achieved with newer, quieter technology, but a major new aircraft has not been developed in the United States for almost 10 years. In that time, important design and technological advances have been made -- many specifically intended to meet the new economic, operating, and environmental constraints dictated by rising labor costs, energy shortages, environmental requirements, and changing market demands.

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* A large number of firm orders from U.S. air carriers are required by manufacturers before they can start production of a new aircraft. The cost of developing the new aircraft alone is put at $500 million to $1 billion.

In past programs to develop a new aircraft, American manufacturers have had enough preproduction sales to U.S. airlines to provide a solid base for financing front-end costs and to insure a near break-even position without foreign sales. This is not the case today, largely because of the financial condition of several of the largest U.S. airlines, which traditionally have led the way with new purchases. Although the carriers gradually are replacing their older inefficient jets, they are doing so with existing model aircraft, and these only in small numbers. The aircraft available now to replace four-engine jets are improperly sized for some markets (e.g., 727s, 747s L-1011s, or DC-10s). Most U.S. airlines would prefer to wait for a family of new, higher technology aircraft, if it were probable that these airplanes would be available within a few years.

Moreover, the public interest is served by the substantial and long term noise benefits available from new technology aircraft. The new technologies that will be utilized in meeting the stricter FAA noise regulations for new aircraft types to be promulgated by next March will bring about an average reduction of 12 to 16 EPNdB from the noise levels of the 707. The accelerated introduction of these quieter replacement planes offers obvious advantages.

Although we are concerned primarily in this policy statement with reducing the impact of aircraft noise, it would be myopic, if not negligent, for us to overlook opportunities for achieving other important national objectives as well. Consequently, we have considered, in addition to the noise benefits accruing from replacement of four-engine aircraft, the energy conservation benefits of improved fuel efficiency, the increasing importance of aeronautical exports to our aviation industry, the declining role of aerospace research and development as a percentage of national defense and NASA outlays, the stimulation of employment in the aerospace and related industries, and the advantages to the consumer of more advanced design and lower operating costs.

How the carriers choose to comply with our noise rules will have long range effects on the development of U.S. technology, employment, the viability and competitiveness of national aerospace industry, and the long term noise benefits that are to be realized. The sum of total benefits, however, mandates a careful assessment of the relative merits of retrofit or replacement by new technologies.

II. LEGAL FRAMEWORK

A. Legal Responsibilities of the Federal Government

The principal aviation responsibilities assigned to the Federal Aviation Administrator, and since 1966 to the Secretary of Transportation, under the Federal Aviation Act of 1958, as amended, concern safety and the promotion of air commerce. The basic national policies intended to guide our actions under the Federal Aviation Act are set forth in section 103, 49 U.S.C. 1303, which provides public interest standards, including:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both; and

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

To achieve these statutory purposes, sections 307(a) and (c) of the Federal Aviation Act, 49 U.S.C. 1348(a), (c), provide extensive and plenary authority to the FAA concerning use and management of the navigable airspace and air traffic control. The FAA has exercised this authority by promulgating wide-ranging and comprehensive federal regulations on the use of navigable airspace and air traffic control.* Similarly the FAA has exercised its aviation safety authority, including the certification of airmen, aircraft, air carriers, air agencies, and airports under Title VI of the Federal Aviation Act, section 601 et seq., 49 U.S.C. 1402 et seq, by extensive federal regulatory action.** In legal terms the federal government, through this exercise of its constitutional and statutory powers, has preempted the areas of airspace use and management, air traffic control and aviation safety. The legal doctrine of preemption, which flows from the Supremacy Clause of the Constitution, is essentially that state and local authorities do not have legal power to act in an area which already is subject to comprehensive federal regulation.

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* See 14 C.F.R. Parts 71, 73, 75, 91, 93, 95 and 97.

** See 14 C.F.R. Parts 21 through 43, 61 through 67, 91, 121 through 149.

Because of the increasing public concern about aircraft noise that accompanied the introduction of turbojet powered aircraft into commercial service in the 1960s and the constraints such concern posed for the continuing development of civil aeronautics and the air transportation system of the United States, the federal government in 1968 sought - and Congress granted -- broad authority to regulate aircraft for the purposes of noise abatement. Section 611 of the Federal Aviation Act, 49 U.S.C. 1431, constitutes the basic authority for federal regulation of aircraft noise. In 1972, displaying some dissatisfaction with the FAA's methodical regulatory practice under section 611, the Congress amended that statute in two important respects. To the original statement of purpose -- "to afford present and future relief from aircraft noise and sonic boom" -- it added consideration of "protection to the public health and welfare." It also added the Environmental Protection Agency (EPA) to the rulemaking process. Section 611 now requires the FAA to publish EPA proposed regulations as a notice of proposed rulemaking. Within a reasonable time of that publication, if the FAA does not adopt an EPA proposal as a final rule after notice and comment, it is obliged to publish an explanation for not doing so in the Federal Register.

Whether considering a rule it proposes on its own initiative or in response to the EPA, the FAA is required by section 611(d) to consider whether a proposed aircraft noise rule is consistent with the highest degree of safety in air commerce and air transportation, economically reasonable, technologically practicable and appropriate for the particular type of aircraft.

The FAA acted promptly in implementing section 611. On November 18, 1969, it promulgated the first aircraft noise regulations, Federal Aviation Regulations, Part 36, 14 C.F.R. 36, which set a limit on noise emissions of large aircraft of new design. It reflected the technological development of the high-bypass ratio type engine, and was initially applied to the Lockheed 1011, the Boeing 747, and the McDonnell-Douglas DC-10. The Part 36 preamble announced a basic policy on source noise reduction and a logically phased strategy of bringing it about. The Part 36 standard would serve as the basic standard for aircraft engine noise and was initially applicable to new types of aircraft. As soon as the technology had been demonstrated, the standard was to be extended to all newly manufactured aircraft of already certificated types. Ultimately, the preamble indicated, when technology was available the standard would be extended to aircraft already manufactured and operating. The last step would require modification or replacement of all aircraft in the fleet which did not meet the Part 36 noise levels. The first two steps have already been accomplished. This third step is being taken now.

Part 36 is commonly misunderstood. Many believe that it established a federal standard of acceptable noise emissions. It did not. Part 36 basically established the quietest uniform standard then possible, taking into account safety, economic reasonableness and technological feasibility. Many think it is a standard that all American aircraft must meet. It is not. Part 36 to date has been applicable only to newly manufactured aircraft and is not applicable to aircraft manufacturered before 1973. Nearly eighty percent of the present fleet is not obliged to and does not meet the Part 36 standard. Many think that it is an operating rule -- that is, that planes that do not meet it in daily operations may not fly. It is not. Part 36 applies to aircraft at the time of their manufacture, and does not apply at all to foreign-manufactured aircraft operated by foreign carriers.*

In addition to its regulatory authority over aircraft safety and noise, the FAA has long administered a program of federal grants-in-aid for airport construction and development. Through its decisions on whether to fund particular projects, the FAA has been able, to a degree, to insure that new airports or runways will be selected with noise impacts in mind. That indirect authority was measurably strengthened when in 1970 the Airport and Airway Development Act expanded and revised the FAA's grant-in-aid program for airport development and added environmental considerations to project approval criteria. 1976 Amendments to the 1970 Act have increased funding levels and provided new authority to share in the costs of certain noise abatement activities, but the ability of the FAA to provide financial assistance remains limited in terms of both percentage of project costs and the types of projects eligible for federal aid.

B. Legal Responsibilities of State and Local Governments

While the federal government's exclusive statutory responsibility for noise abatement through regulation of flight operations and aircraft design is broad, the noise abatement responsibilities of state and local governments through exercise of their basic police powers are circumscribed. The scope of their authority has been most clearly described in negative terms, arising from litigation over their rights to act.

The chief restrictions on state and local police powers arise from the exclusive federal control over the management of airspace. Local authorities long have been preempted by the federal assumption of authority in the area from prohibiting or regulating overflight for any purposes. That principle was found in 1973 to include any exercise of police power relating to aircraft operations in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). In the Burbank

* Annex 16 to the Chicago Convention provides an international noise certification standard.

case, the Supreme Court struck down a curfew imposed by the City in the exercise of its police power. The Court's reliance on the legislative history of section 611 and the 1972 amendments to it indicate that other types of police power regulation, such as restrictions on the type of aircraft using a particular airport, are equally proscribed. The Court, however, specifically excluded consideration of the rights of an airport operator from its decision.

There remains a critical role for local authorities in protecting their citizens from unwanted aircraft noise, principally through their powers of land use control. Control of land use around airports to insure that only compatible development may occur in noise-impacted areas is a key tool in limiting the number of citizens exposed to noise impacts, and it remains exclusively in the control of state and local governments. Occasionally, it is a power enjoyed by individual airport operators; some operators are municipal governments that can impose appropriate land use controls through zoning and other authority. But even where municipal governments themselves are operators, the noise impacts of their airports often occur in areas outside their jurisdiction. Other police power measures, such as requirements that noise impacts be revealed in real estate transactions, are also available to them. Finally, local governments have legal authority to take noise impacts into account in their own activities, such as their choice of location and design for new schools, hospitals, or other public facilities, as well as sewers, highways and other basic infrastructure services that influence land development.

C. Legal Responsibilities of Airport Proprietors

The responsibilities of state and local governments as airport proprietors are far less restricted. Under the Supreme Court decision in Griggs v. Allegheny County, 369 U.S. 84 (1962), proprietors are liable for aircraft noise damages resulting from operations from their airport. The proprietor, the court reasoned, planned the location of the airport, the direction and length of the runways, and has the ability to acquire more land around the airport. From this control flows the liability, based on the constitutional requirement of just compensation for property taken for a public purpose. The Court concluded: "Respondent in designing the Greater Pittsburgh Airport had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough." The role of the proprietor described by the Court remains the same today.

But the proprietor's responsibilities do not end there. A three-judge district court observed in Air Transport Association v. Crotti, 389 F. Supp. 58 (N.D. Cal., 1975):

> "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport, is a necessary concomitant, whether it be directed by state police power or by his own initiative.... That correlating right of proprietorship control is recognized and exempted from judicially declared federal preemption by footnote 14 [of the Burbank opinion] . Manifestly, such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities...."

The Crotti case upheld in part a California airport noise statute imposing noise abatement duties on airport proprietors and established the principle that a state statute could reach proprietors that are governmental agencies and hence arms of the state. The Burbank preemption rule thus has not extended to proprietors, except with respect to regulations that actually affect the flight of aircraft. The portion of the California statute struck down by the court provided for criminal sanctions against the operator of an aircraft that exceed a single-event noise standard on takeoff or landing, a clear interference with the FAA's control over flight operations in the navigable airspace.

The Crotti principle has recently been upheld in National Aviation v. City of Hayward, No. C-75-2279 RFP (N.D. Cal., July 13, 1976), a case in which an air freight company sought to enjoin a curfew on noisier aircraft imposed at the municipally owned Hayward Air Terminal in California. The court addressed squarely the legal issue of the rights of a proprietor and found that the curfew had not been preempted:

> [T]his court cannot, in light of the clear Congressional statement that the amendments to the Federal Aviation Act were not designed to and would not prevent airport proprietors from excluding any aircraft on the basis of noise considerations, make the same findings [as the Burbank Court] with respect to regulations adopted by municipal airport proprietors..." Slip opinion, 14, citing S. Rep. No. 1353, 90th Cong., 2d Sess., 6-7.

The court went on to indicate that the FAA had the authority to preempt such proprietor regulation, although it had not yet exercised it. The court also found that the ordinance, which required some of the plaintiff's aircraft to use another airport between 11 p.m. and 7 a.m., had an effect on interstate commerce, but that the effect was:

> "...incidental at best and clearly not excessive when weighed against the legitimate and concededly laudable goal of controlling the noise levels at the Hayward Air Terminal during late evening and morning hours." Slip opinion, 19.

The power thus left to the proprietor - to control what types of aircraft use its airports, to impose curfews or other use restrictions, and, subject to FAA approval, to regulate runway use and flight paths, is not unlimited. Though not preempted, the proprietor is subject to two important Constitutional restrictions. He first may not take any action that imposes an undue burden on interstate or foreign commerce and, second may not unjustly discriminate between different categories of airport users.

These limitations on the proprietor's control over the use of the airport have not been addressed by the Supreme Court, and it remains unclear the extent to which Constitutional limitations would prevent some of the restrictions that have been imposed or proposed by proprietors in recent years.

Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake - and have considered carefully and rejected - full and complete federal preemption of the field of aviation noise abatement. In our judgment the control and reduction of airport noise must remain a shared responsibility among airport proprietors, users, and governments.

The legal framework with respect to noise may be summarized as follows:

1. The federal government has preempted the areas of airspace use and management, air traffic control, safety and the regulation of aircraft noise at its source. The federal government also has substantial power to influence airport development through its administration of the Airport and Airway Development Program.

2. Other powers and authorities to control airport noise rest with the airport proprietor - including the power to select an airport site, acquire land, assure compatible land use, and control airport design, scheduling and operations - subject only to Constitutional prohibitions against creation of an undue burden on interstate and foreign commerce, unjust discrimination, and inteference with exclusive federal regulatory responsibilities over safety and airspace management.

3. State and local governments may protect their citizens through land use controls and other police power measures not affecting aircraft operations. In addition, to the extent they are airport proprietors, they have the powers described in paragraph 2.

III. THE FEDERAL RESPONSE

Consistent with the legal principles set forth above, this section explains in greater detail the program we intend to implement and our reasons for adopting it.* The cornerstone of the federal program is the requirement that airplanes comply with Part 36 noise standards within six to eight years. This policy clarifies the relative responsibilities of all participants in achieving reduced aircraft noise exposure. The way in which the air carriers meet this requirement for particular types of aircraft will have substantial implications not only for noise reduction but also for other national objectives - energy conservation, employment, and export promotion - as well. Moreover, the effectiveness of any resource commitment which may be required to meet this standard is contingent upon complementary action by airport proprietors and local government, actions that will be encouraged with federal financial assistance, other incentives, grant conditions and technical assistance. Complementary federal action includes noise abatement procedures, research and development and stricter noise standards for new technologies. The complete comprehensive strategy to bring about substantially reduced noise impact on residential populations is set forth in the following federal action program.

A. Quieting the Air Carrier Fleet

1. Federal Regulation of Existing Aircraft

Federal action is required to ensure that commercial aircraft meet Part 36 noise levels within the next decade. The normal incentives of the private marketplace do not operate to achieve optimal noise reduction. Noise is an "external cost" of providing certain goods and services. In the case of aircraft noise, the recipient of the noise -- such as the resident under the flight path -- is most often not a party to the market transactions (e.g., the purchase and sale of aircraft and of aircraft passenger tickets) that result in the noise that affects him. The purchasers of aircraft service -- the aviation passengers -- are not necessarily the recipients of the aircraft noise, and therefore the provider of that service (the airline) does not have a normal market incentive to reduce noise. Because the market place does not compensate airport neighbors for noise damages, they may seek redress from the courts. However, law suits are an expensive, time consumming and uneven way of dealing with the problem, and damage payments may drain away scarce resources that could be applied to reducing noise impact.

Because there are important differences among the airplanes that do not meet Part 36, it is useful to consider them separately.

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* The projections set forth in this document are based on the best available data. We realize it is subject to continuing refinement and improvement.

A significant problem is posed by the older, four-engine models (707s, 720s, DC-8s) in the current fleet. These aircraft are, for the most part, powered by JT3D turbofan engines and impose the most severe noise insult on airport neighbors because they cause the noisiest single events (10 to 12 EPNdB over Part 36). They are perceived to be at least twice as loud as the new wide-body aircraft. They are particularly significant contributors to the overall noise level at major airports having serious noise problems.

Replacement or acoustic modification (retrofit) of these older four-engine jets must be given high priority. Acoustic modification or retrofit consists of the addition of quiet nacelles using sound absorbing material (SAM) that reduces significantly the noise levels of these four-engine aircraft to at least the Part 36 noise levels. This approach, however, is subject to the availability of retrofit kits and, has been shown to be somewhat fuel inefficient. Because of the environmental benefits of replacement, discussed below, retirement of most of these older aircraft is clearly preferable.

The older two- and three-engine aircraft (727s, 737s, DC-9s, BAC 1-11s, mainly powered by JT8D turbofan engines) are not as noisy on single events. But, because they are medium and short-range models, they take off and land more than four times as often per day as the long-range four-engine models. Since they are also more pervasive in our domestic system, they account for most of the air carrier operations (80 percent) nationwide.*

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* Scheduled Air Carrier Jet Operations**
Average Daily, 1975

Airplane Type	Number of Operations	Percent	Percent Meeting Part 36 Noise Standards
707/DC-8	2225	10	0
747	411	2	54
DC-10/L-1011	1340	6	100
727	9208	41	26
737/DC-9/BAC 1-11	9334	41	8
Total	22518	100	21

** An operation is a takeoff or a landing.

Although the technology to retrofit these JT8D aircraft is available, the resulting reductions in noise levels is not as large as the reductions for the JT3Ds. A modified JT8D airplane is significantly quieter than an unmodified JT8D airplane, especially on approach.* We estimate that the cost of retrofitting all of these airplanes will be about $223 million in 1976 dollars. Since most of these airplanes have a long remaining useful life, we anticipate that they will be modified rather than replaced.

Because of their larger numbers, more frequent operation, and more widespread use, the cumulative effect of reducing the noise of these JT8D aircraft is greater than that for the four-engine aircraft alone. By requiring that both the two/three- and the four-engine aircraft meet Part 36 noise levels, we will realize significantly greater reduction at the 25 largest air carrier airports at the time compliance is completed. Additionally, many more air carrier airports would benefit from quieting of the two- and three-engine airplanes. Without including the two- and three-engine jets, which constitute 70 percent of that part of the operating fleet that does not meet Part 36 and which account for 80 percent of the air carrier operations nationwide, 75 percent of the air carrier airports in the country would not receive any noise benefit and 85 percent would not receive any significant benefits.

There are also about 50 early 747s that do not meet Part 36 noise levels. Economics clearly make retrofit the logical alternative for these aircraft, which have a long remaining useful life, and a retrofit kit for modification of these aircraft has been included in later production versions of the 747.

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* Noise measurements taken during routine airline operations at airports in the New York City area showed that 727-200 aircraft with SAM retrofit treatment operated at 6.5 PNdB (estimated from dBD measurements) lower levels on approach than did 727-200 aircraft without retrofit.

The following table illustrates the comparative reductions expressed in EPNdB of the retrofit of those airplanes that do not meet FAR 36.

Aircraft	Condition	FAR 36 Limit	Non-Retrofit	Full Retrofit
707-320B	Takeoff	103.7	113.0	102.2
	Approach	106.3	116.8	104.0
	Sideline	106.3	102.1	99.0
DC-8-61	Takeoff	103.5	114.0	103.5
	Approach	106.2	115.0	106.0
	Sideline	106.2	103.0	99.0
727-200	Takeoff	99.0	101.2	97.5
	Approach	104.4	108.2	102.6
	Sideline	104.4	100.4	99.9
737-200	Takeoff	95.8	92.0	92.0
	Approach	103.1	109.0	102.0
	Sideline	103.1	103.0	103.0
DC-9	Takeoff	96.0	96.0	95.0
	Approach	103.2	107.0	99.1
	Sideline	103.2	102.0	101.0
747-100	Takeoff	108.0	115.0	107.0
	Approach	108.0	113.6	107.0
	Sideline	108.0	101.9	99.0

The following table provides an estimate of the numbers of airplanes to be modified acoustically or replaced. Also included are what the associated capital costs of retrofit would be if the turbofan-powered 707s and DC-8s are not retired or replaced earlier than they otherwise would have been as a result of the new federal regulation.

Airplane Type	Number to be modified	Average Cost (million $)	Total Cost (million $)	1975 Present Value (million $)
727	454	.225	102	60
737 & DC-9	448	.27	121	71
747	45	.25	11	6
707 & DC-8	270	1.2	324	159
TOTAL	1217		558	296

These costs are in constant 1975 dollars, and do not include any tax benefits or changes in operating costs. The present values were computed using a 10% discount rate before inflation. If changes in operating costs are also included, the 1975 present value costs increase to a total of $440 million. These operating cost increases are primarily the result of the increased fuel inefficiency of modified 707s and DC-8s and include the cost of an additional 320 million gallons of fuel which would be consumed by these airplanes.

2. Economic Benefits from a Mixed Replacement and Modification Program

Despite the arguments that the variables and projections are uncertain, cost-benefit analysis is a useful tool to compare means of reducing aircraft noise. Our analysis indicates that replacement of all JT3D aircraft and acoustic modification of the JT8D aircraft will yield positive net benefits of $350 million to the airlines* whereas altering the scenario by retrofitting the JT3D airplanes instead would cost them $440 million. The primary reasons for these differences are varying fuel consumption and maintenance costs.

A replacement program also produces many benefits that are difficult to calculate, but which would be significant.

- The noise benefit from replacing these jets with new aircraft or new technology will range from a 12 to 16 EPNdB improvement over current 707/720 and DC-8 airplanes.

- Replacement would offer substantial advantages in increased fuel efficiency over the 707/720 and DC-8, 20 percent with currently-available replacement models, and as much as 30 percent for the new-technology airplanes compared to a fuel penalty of approximately one percent for modified 707 and DC-8 airplanes.

- Replacement would provide aircraft that will meet the new, rigorous air pollutant emissions standards effective in 1979.

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* See the FAA benefit-cost study published as an attachment to the Final Environmental Impact Statement issued November 17, 1976.

- Replacement would strengthen the aerospace industry, stimulating the purchase orders to begin manufacture of aircraft of new design, which the airframe manufacturers cannot undertake now because of the lack of firm orders from their customers.

- Replacement would contribute to the development of aviation technologies for export. Aerospace products have been second only to agricultural products as the nation's leading exports. Foreign operators own over 500 JT3D airplanes for which U.S. replacements sized for many of the markets being served are not now available. Most of these airplanes would be replaced if a properly sized replacement were available.

- Replacement would provide many more jobs - each billion dollars in aircraft sales generates 60,000 job-years directly or indirectly in aerospace or related industries.

- Replacement would offer to the carriers the advantage of more economic aircraft configurations resulting from the application of advanced technologies. These include new aerodynamic concepts, lighter propulsion systems, improved safety from inflight control systems, and new structural materials. With enactment of regulatory reform, many of these economies would be reflected in the fares.

In light of these benefits, we believe that it would be economically preferable for the Nation if most of the four-engine aircraft are replaced with new technology aircraft.

3. Time Frame

Since some combination of replacement and retrofit is advantageous in bringing current airplanes into compliance with the noise standards of Part 36, we have considered what would be a reasonable time frame to require such action.

In establishing a deadline, we have been concerned with the length of time needed to develop, certificate, produce, and install retrofit kits for those airplanes for which the operators decide that retrofit is best. The manufacturers have indicated that it will take six years to complete retrofit of the 747s,

727s, 737, and DC-9s, six to eight years to complete the 707s and DC-8s, including kit production* and installation time.

Retrofit kits are currently certificated and ready for installation for the two- and three-engine aircraft and the 747s, and are being installed on those aircraft that are currently in production. It may take 28 months and 36 months, respectively, to design and certificate kits for the 707s and DC-8s, with fabrication and installation time to follow. Thus, time to fabricate the required number of kits, and to install them during refurbishment periods for fleet aircraft must govern the mandatory compliance periods. Given these considerations, we have concluded that aircraft should be required to meet Part 36 noise levels within certain time periods.

The Federal Aviation Administration will promulgate a rule requiring that subsonic jet airplanes in domestic** service with maximum weight in excess of 75,000 lbs., that do not meet the present Federal Aviation Regulations Part 36 noise levels, must meet those noise levels or be retired from the fleet within six to eight years in accordance with the phased-in schedule set forth on pages 5-6 of this policy statement.

These time periods, which are established on the basis of the time it would take to complete the development, production, and installation of retrofit kits for most of the existing fleet, will start to run on January 1, 1977. These time periods are also adequate to enable the development of new technologies for replacement of older, four-engine aircraft if adequate financing is available. Measures imposed by other jurisdictions that would require more accelerated compliance with Part 36 requirements would conflict with the purpose of this federal regulation.

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Airplane	From Production Decision to First Kit Delivery	Production Rate Ship Sets Per Month
707	2-1/3 yrs	22
DC-8	3 yrs	8.5
727	1-1/2 yrs	38
737	1-1/2 yrs	10
DC-9	1-3/4 yrs	15
747	1 yr	5

** Domestic service as used here includes flights to U.S. territories outside continental United States, generally classified as "overseas".

4. International Air Carriers

The United States will seek early agreement through the International Civil Aviation Organization (ICAO) on noise standards and an international schedule for compliance with Annex 16 or Part 36. In the event that agreement is not reached within three years, from January 1, 1977, then regulatory action will be taken to require all airplanes operated by all international operators to meet the noise level standards of Part 36 or Annex 16 during the five-year period thereafter at a phased rate of compliance similar to that established for domestic operations. The ultimate requirements applied to U.S. international flag carriers will not be any more stringent than those applied to foreign air carriers, because it would place the U.S. international flag carriers at a competitive disadvantage if they had to comply with the noise standards sooner than their foreign competition. Where U.S. air carriers serve both domestic and foreign routes, the delayed international requirements will be applied only for that percentage of total operations that are in international sevice. These requirements may be superseded by agreement reached through ICAO, in which the United States concurs and which does not discriminate against U.S. carriers.

B. Financing Mechanism

President Ford has instructed the Department of Transportation to promulgate rules to require that all aircraft in domestic service meet noise standards within eight years. He indicated at that time that he would again urge the Congress to enact his aviation regulatory reform measure to create an improved economic climate for the airline industry that would enable it to comply with these standards. He further directed the Secretary to begin public hearings promptly to assess whether additional financing assistance, if any, may be necessary to guarantee compliance with these standards within eight years.

At the public hearing, scheduled for December 1, 1976, we must first consider whether any financing arrangements at all are necessary. If there is persuasive evidence and documentation that such assistance is necessary, alternative financing proposals must be weighed against certain goals.

First, we would prefer that the costs of noise abatement be borne by users of air transportation, passengers and shippers. Any shift of that burden to the general public must be avoided. Second, enough financing must be available to enable the carriers to replace a significant portion of their noisy four-engine jets with a new generation

airplane but not so much financing as to encourage the purchase of excess capacity. Third, federal involvement in any financing mechanism should be limited and not disturb unduly the mechanism of the private capital markets, nor unreasonably constrain the flexibility of air carrier management in determining how to comply with the noise regulation. Fourth, the cost of transportation to the passenger and shipper should not be increased. Fifth, assuming the enactment of aviation regulatory reform, we should consider both the need for additional financing in the improved aviation economic environment that will emerge and the consistency of any proposal with a less regulated aviation system. Finally, we should consider and assess the additional benefits to the public that would accrue from a replacement program, and the accelerated production of new technology airplanes, and determine whether these benefits outweigh the cost of such a program.

To address these issues and hear recommendations from concerned parties, a public hearing will be conducted on aviation noise financing on December 1, 1976.

C. Additional Federal Action

1. Source Regulation for Future Aircraft

The development of jet engine noise source technology since the high-bypass ratio engine was first produced will allow further reduction of noise emissions from aircraft designed in the future. Therefore, FAA proposed to reduce the Part 36 noise levels for future design aircraft in NPRM 75-37 issued October 29, 1975. While recognizing that the full benefit of such a rule will not be felt until the next generation of aircraft enter regular service in substantial numbers, the FAA will soon complete its consideration of new, lower noise standards for future design aircraft. These standards will require that recent advances in noise suppression technology be employed if they are practicable, economically reasonable, and appropriate for the particular type of aircraft. These regulations would be applicable to all newly designed subsonic aircraft type certificated after the effective date of the regulation. The FAA plans to issue these regulations by March 1, 1977.

On September 30, 1976, the EPA submitted a proposed regulation to FAA on the subject of source regulation for future design aircraft. That proposal has been published by FAA as a notice of proposed rulemaking (41 F.R. 47358) and a public hearing will be held on December 14, 1976. The only difference between the FAA regulatory proposal and that of EPA is in the establishment of noise levels for aircraft designed for the 1980-1985 time period and beyond 1985 as well. While these EPA proposals are

being considered, the FAA believes it is important and prudent to establish lower noise levels for future designed aircraft and continue to analyze the technological developments to determine if even further reduced noise levels can be established.

In addition, the FAA is working through the International Civil Aviation Organization to obtain international agreement on noise standards which would make internationally established standards virtually identical to United States noise standards. This proposal was presented for public comment in the Federal Register on October 28, 1976, as NPRM 75-37C. Both of these important proposals and the comments received on them will be thoroughly considered and carefully analyzed before final action is taken.

The FAA has already established noise standards on the subject of noise produced by propeller driven airplanes. In developing those standards, the FAA received a number of suggestions from the EPA which were adopted and incorporated into the final rule. These included the use of six rather than four noise certification test overflights and the use of longer standard takeoff distances in calculating performance corrections. These suggested improvements were submitted to FAA in the course of FAA's rulemaking action on this subject and were subsequently included as part of a formal EPA noise regulatory proposal submitted to FAA. The proposed disposition of the EPA regulatory proposal has been forwarded by FAA to the EPA for consultation pursuant to the provisions of the Noise Control Act. The time for this consultation has been extended by FAA at the request of the EPA and therefore the FAA is deferring its final action on this proposal at this time at the request of the EPA.

Using information being acquired on a continuing basis from the Concorde demonstration, the FAA will act consistent with the statutory requirements to promulgate a noise rule applicable to supersonic aircraft not later than thirty days after the conclusion of the 16-month demonstration periods.

2. Aircraft Operating Procedures

Operational procedures for the control of aircraft departures and arrivals at airports can effectively complement the reduction of aircraft source noise emissions. For example, operational controls that apply reduced thrust settings near the ground augment the noise reduction achieved through retrofitting because with the sound absorbing material or "quiet nacelle" modification of the JT3D and JT8D aircraft the noise reduction achieved becomes more effective at lower thrust levels. It must be clearly understood that, although much can be gained by operational procedures, they are not alternatives to reducing noise at the source by replacing or retrofitting the noisier airplanes.

Many air traffic and airspace management operational procedures are now used at particular airports to meet their particular needs. For some airports, normal approach paths cover substantial residential populations (Los Angeles); others are partiuclarly sensitive to takeoffs (Miami). Where possible, approach paths are designed to avoid residential neighborhoods. At some airports, steep climbs are used on takeoff over water areas so that aircraft will be higher than they would be otherwise when they reach inhabited areas. Where aircraft must climb over residential areas, they often do so with reduced power in order to minimize excessive noise from greater engine thrust.

In addition to these measures, which are used at many airports, two standardized operational procedures have been under consideration by the FAA. One EPA approach proposal involved the development and implementation of the use of a two-segment landing approach path for aircraft. Briefly, that procedure entails the use of a steeper glide slope (e.g., 5 to 6°) during the early stages of approach, followed by stabilization of the aircraft on the normal 3° glide slope for final approach and touchdown. During the steeper portion of the approach, the aircraft is higher from the ground and requires less engine power, thus achieving noise reductions at more distance points from the airport on the approach pattern. However, this would not provide significant noise relief to persons living close to an airport and could exacerbate their problem since there would probably be an increase in power required as the aircraft changes configuration from the steeper glide slope to the reduced glide slope. Additionally, this procedure has an inherent safety problem related to the impact of aircraft wake vortices on aircraft flying a standard 3° approach behind an aircraft utilizing a two-segment approach. Finally, this two-segment approach procedure could be applied at a limited number of airports because of limited equipment availability.

The second standardized approach procedure involves the use of minimum certificated flaps. This procedure was developed by FAA to abate airplane noise and then proposed by EPA as a regulatory action. Through the use of minimum certificated flaps during approach, aerodynamic drag is reduced, whereby less engine thrust is required. This has multiple advantages because reduced thrust results not only in a fuel saving but also a reduction in the source noise of the airplane over the entire approach phase, thereby providing a noise reduction along the entire approach path. Moreover, it is a procedure which can provide noise benefits at all rather than a limited number of airports. Because it is a stablized approach procedure, it reduces cockpit workload in that no transition is required

from a 6° to a 3° glide slope and the inherent potential wake vortex problem a serious safety problem for following aircraft of is eliminated. Final regulations and procedures on a noise abatement approach procedure will be issued by FAA by January 1, 1977.

Several opinions exist regarding the best noise abatement departure procedure following takeoff. The FAA requires that turbine-powered and large aircraft climb as rapidly as possible to 1500 feet above the ground. This procedure provides some noise relief by getting the noise source - the airplane - away from populated areas as rapidly as possible. FAA is in the process of evaluating different departure procedures which could be implemented after the 1500 foot altitude is reached. The issue is complicated by the fact that airports are unique in terms of their surrounding geography and adjacent land use. This means that there may be no single optimum noise abatement departure procedure.

The FAA currently recommends, in Advisory Circular 91-39, (January 18, 1974) a procedure that incorporates a reduction in engine power from takeoff thrust to normal climb power at an altitude of 1500 feet above ground level after takeoff with subsequent acceleration and climb after passing through 3000 feet by changing the deck angle and retracting the flaps. This procedure is generally used by scheduled air carriers. Northwest Airlines regularly uses a somewhat different departure procedure, in which the airplane is accelerated at takeoff power with an accompanying reduction in the deck angle and flap retraction followed by a larger power reduction than with the Advisory Circular procedure. Both procedures have merit in that both provide noise relief by reducing source noise through a reduction in engine power. The degree of perceived noise, however, depends on the location of noise sensitive areas beneath the departure path and the altitude and engine power of the airplane over those areas. The FAA expects to complete regulatory action on this subject by January 1, 1978.

Another operational rule under consideration involves possible restrictions on minimum altitudes in terminal areas by keeping airplanes high. Such restrictions would reduce the noise impact on the ground by maximizing the distance between the airplane and persons on the ground. This has been the FAA "Keep 'Em High" Program. A proposal on this subject to convert it from an air traffic management program to a regulatory requirement was submitted to the FAA by the EPA and was published in the Federal Register on January 6, 1975, as NPRM 75-40.

The design of each terminal area air traffic pattern is carefully constructed to meet the particular characteristics of the airport or airports encompassed within that terminal area. The runway configuration of the airport, character of the surrounding terrain,

proximity of other airports, the requirements to avoid when possible low altitude flight over communities when arriving or departing the airport, are among the many considerations that must be made in designing terminal area procedures. It is not feasible to develop a single rule that would be applicable to all terminal areas for all airports. Regulations, which are relatively difficult to change, could have a severe and far-reaching impact on the air traffic system in the flexibility required to adjust air traffic procedures to compensate for weather changes, traffic congestion and safety considerations. Regulatory action in this area would be unduly restrictive without achieving significant improvements in aircraft noise abatement since the proposed rules were not significantly different from the existing air traffic management program and would have adverse energy and economic impacts through increased flight time and increased fuel consumption.

The FAA concurs with the objective of the EPA proposed regulations, specifically to reduce the noise exposure on the ground. Through recent FAA studies of ways to improve the efficiency of the air traffic control system to conserve fuel, a new procedure has been developed which improves safety through reduced low altitude flying time, standardizes high performance aircraft arrival procedures, equalizes the arrival delays through regulating the traffic flow, and provides for departures to climb to cruise altitude unrestricted. These new procedures will soon be made final in an FAA Order on Local-Flow Traffic Management. The Order will apply to all airports where high performance aircraft operate. The existing "Keep-'Em-High" Order will be phased out as the provisions of the new Order are implemented. A substantial noise benefit can be realized through the implementation of the Local-Flow Traffic Management Order over those benefits achievable under the FAA "Keep-'Em-High" program or the EPA proposed minimum altitude regulatory proposal.

All of these operational procedures designed to provide noise relief have been the subject of a number of discussions with the EPA and have been the subject of formal consultation between the FAA, the EPA and the Secretary of Transportation. That consultation process has been completed and the FAA has taken final action to implement these operational procedures.

3. Federal Research and Development Technology

As is the case with most fields of technology, continuing research and development on aircraft noise is necessary to insure that advances in the state-of-the-art are available for each successive

generation of aircraft. Historically, there has been a ten-year lag in the aircraft industry between demonstration of new technology in the laboratory and the appearance of that technology in commercial airplanes. For example, the present generation of quieter wide-body airplanes, such as the 747, DC-10 and L-1011, which began to enter commercial service in 1970, applied quieter technology of the high-bypass ratio engine developed about 1960. Similarly, more advanced engine quieting technology, which is being developed today, cannot realistically be expected to enter commerical service for at least five to six years.

Aircraft noise is generated primarily by two major sources in the engines: the external turbulent jet exhaust and the internal compressors and combustion process. High-bypass ratio engines, such as the Pratt and Whitney JT9D, the General Electric CF-6 and the Rolls Royce RB-211 now used on the 747, L-1011 and DC-10 aircraft, reduce the primary jet exhaust velocity and thus reduce its noise At the same time, improved sound absorbing materials in the nacelle surrounding the engine absorb much of the internal noise produced by the compressors and the combustion process. Current technology in new engines, such as the Pratt and Whitney JT10D, and the General Electric CFM56, show potential for further reductions in engine noise levels through improved designs of the internal compressors which, if combined with more efficient wing design, and more effective control surfaces (flaps, spoilers, etc.) will require less engine thrust for safe flight, thereby providing further noise reductions.

It is expected that the technology for use in the next generation of commercial airplanes should provide further significant reductions below current noise standards. These will be evaluated carefully in considering both the applicability and scheduling of lower level requirements, such as proposed in NPRM 76-22.

A recent NASA analysis* has shown quite clearly that substantial long-term (through the year 2000) reductions in noise, fuel consumption, and aircraft emissions are achievable through the development and introduction of more advanced technology than that currently available. Realization of potential advantages through the extensive use of composite materials to reduce airframe weight, stability augmentation to reduce drag, and improved performance of advanced-technology engines such as the prop-fan will depend on the research and development necessary to demonstrate these factors. Such features can become available for service in the late 1980s, assuring continuing progress in aircraft quieting along with fuel economy, cleaner operation, and greater productivity.

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* "Cost/Benefit Tradeoffs for Reducing the Energy Consumption of Commercial Air Transportation," NASA CR-137877, June 1976.

The federal government will continue to sponsor and support aviation research and development, in cooperation with the aviation industry. As engine noise levels are reduced, the aerodynamic noise from airflow over and around the airframe itself and its necessary appendages, especially at low altitudes, when flaps and landing gear are extended, may become the major approach noise source. Research on this noise source to determine how it may best be reduced is now underway and will continue.

D. Protecting the Airport Environment

There are over 13,000 public airports operated in the United States today and they vary considerably in size, proximity to populated areas and function as well as in the type and volume of operations. For example, only about 500 airports are fully certificated* by the FAA, while another 500 have limited certificates. Only 437 airports have an FAA air traffic control tower. American airports are also the busiest in the world; 84 airports have a total of over 200,000 annual operations,** while 160 airports have 150,000 or more annual operations. Busy airports are not only found in the larger metropolitan areas; while 244 airports have 100,000 or more annual operations, of these only 151 are located in large or medium hubs.*** Most of these operations are general aviation; only the top ranked 24 airports each have 100,000 or more annual air carrier operations.

The variety of airports in the United States demonstrates that an airport noise reduction strategy cannot be completely generalized. The problem must be approached on an airport-by-airport basis, and all levels of government and the private sector should act with the recognition that solutions to the noise problem must be designed to meet the needs of a particular airport environment.

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* Under section 612 of the Federal Aviation Act, 49 U.S.C. 1432, the FAA issues operating certificates to airports served by Civil Aeronautics Board certificated air carriers that the FAA finds "properly and adequately equipped and able to conduct a safe operation."

** An operation is a takeoff or a landing; a flight thus consists of two operations, one takeoff and one landing.

*** A "hub" is defined by the FAA as a city in a standard metropolitan statistical area, as defined by the Bureau of the Census, requiring air service.

1. The Airport Proprietor's Responsibility

Substantial benefits will be achieved through federal actions to abate source noise and control operational flight procedure and airspace, but much of the noise problem is airport-specific and must be addressed by individual proprietors. Noise impact at any airport is in part due to local decisions on airport location, continuation of airport operations on a particular site, the layout and size of and airport and the purchase of buffer areas for noise abatement purposes. It is local decision-making that permits residential development near an airport. For these reasons, the Supreme Court concluded that proprietors are liable for aircraft noise damages. In addition, airport proprietors, particularly those that are public agencies, generally encourage more service to their airports in Civil Aeronautics Board route proceedings.

The need for local action is apparent. Without effective land use planning, the implementation of land use plans and zoning, the benefits achievable from federal source noise reduction requirements could be greatly reduced. Where land use controls have not been imposed, the need for substantial airport land acquisition has increased, and as aircraft operations increase, the need for land acquisition as well as its cost will rise unless source noise levels are reduced.

The airport proprietor is closest to the noise problem, with the best understanding of both local conditions, needs and desires, and the requirements of the air carriers and others that use his airport. The proprietor must weigh the costs the airport and the community must pay for failure to act, and consider those costs against any economic penalties that may result from a decision to limit the use of the airport through curfews or other restrictions for noise abatement purposes.

FAA officials have and will continue to work with and assist airport operators and representatives of communities affected by airport noise to encourage the development of compatible land use controls. What constitutes appropriate land use control action depends on the proprietor's jurisdiction to control or influence land use. This, of course, varies with airport location. Almost all airport proprietors, however, are public agencies with a voice in the affairs and decisions of their respective communities. In some instances they have land use control jurisdiction and are required to document how they will exercise it before receiving federal airport development funds. In other instances, where they lack such direct control,

before receiving federal airport development funds they are required to demonstrate that they have used their best efforts to assure proper zoning or the implementation of other appropriate land use controls near the airport and will continue to do so. Although the airport proprietor may not have zoning authority, he is often the local party in the best position to assess the need for it and to press the responsible officials into action.

2. State and Local Government Responsibility

State and local governments are directly and uniquely responsible for ensuring that land use planning, zoning, and land development activities in areas surrounding airports is compatible with present and projected aircraft noise exposure in the area. They should work closely with airport proprietors in planning actions to be taken in confining serious aircraft noise exposure to within the airport boundary and reducing the number of people seriously affected by airport noise.

State and local governments should support airport land use acquisition programs developed by airport proprietors. As federal noise source regulations shrink the contours of cumulative noise exposure, local governments concurrently should develop complementary land use plans preventing residential development and other incompatible land use in areas adjacent to the airport. Now that the federal government has defined a program extending the application of Part 36 standards, the local authorities will be able to plan effectively on the basis of a reasonable set of assumptions about the shrinkage in noise contours that will occur as a result of the federal action.

State and local governmental agencies can improve the insulation of housing, schools, community facilities, institutions providing health services and public buildings in areas exposed to serious airport noise. To date, such action would have been prohibitively costly. To achieve a 3 to 7 dBA reduction in the level of noise heard inside buildings by insulation would currently cost $1.9 billion nationwide, while a reduction of 8 to 12 dBA would cost $3.8 billion, and a reduction of 13 to 16 dBA would cost $7.2 billion. Given a federal program to require compliance with Part 36, a housing insulation program becomes more manageable and far less expensive. State and local governments should therefore develop appropriate programs to insulate public buildings and to finance insulation by private residents. In this regard, the Department is under a mandate in the Airport

and Airway Development Act of 1976 to study the feasibility, practicality, and cost of insulating schools, hospitals, and public health facilities near airports and report legislative recommendations by July 1977. Local regulations should require proper insulation in the construction of new buildings and insulation of public and residential buildings. State and local governments should help finance the sound insulation of schools, hospitals, libraries, and other noise-sensitive public buildings.

Where appropriate, state and local governments should consider the development of new airport sites so that dense population areas will not be exposed to excessive noise and develop the necessary ground transportation to make them accessible. They should also require that notice of airport noise exposure be given to the purchasers of real estate and to prospective residents in areas near airports so that they will be aware of the problem. Finally, they should support improvements at existing airports which would help reduce the noise impact on surrounding communities.

3. Federal Support for Airport Proprietor and Local Government Noise Abatement Activities

The FAA has long encouraged planning to assure not only that airports will be adequate to provide the service required in the future but that prospective noise impacts are evaluated and minimized In the past this FAA policy has been implemented through three principal methods involving the Airport Development Aid Program (ADAP).

First, under section 16 of the Airport and Airway Development Act, the Secretary may approve a project only if he is satisfied that it is "reasonably consistent" with the plans of planning agencies for the development of the area in which the airport is located. A project may not be approved unless "fair consideration has been given to the interest of communities in or near where the project may be located." The Act further declares as national policy that the projects involving airport location, runway location or a major runway extension shall "provide for the protection and enhancement of the natural resources and the quality of environment of the Nation," and provides that when an airport or runway location or major runway extension will have adverse environmental effect, it may not be approved unless "no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect." In addition, section 18(4) of that Act provides that among the conditions precedent to project approval are:

> appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft.

While the FAA does not and, in our judgment, should not have the power to control land use around airports throughout the United States, the grant of federal funds for airport development has been and will continue to be conditioned on the application of the foregoing principles.

Second, the FAA has awarded ADAP funds for the development of airport Master Plans. These plans contain an environmental analysis and planning elements to assure that the airport's noise impact is kept to a minimum.

Third, the recent Airport and Airway Development Act Amendments of 1976 (P.L. 94-353) authorize for the first time the use of federal airport development funds on projects designed to achieve noise relief. Specifically, section 11 of the Act now authorizes federal financing of land acquisition to insure compatibility with airport noise levels and the acquisition of noise suppression equipment. We will also seek an amendment of that Act which would authorize the use of ADAP funds for the purchase of noise monitoring equipment.

For the most part, these provisions have led the FAA to concentrate on noise abatement efforts in the context of capital investment. Less attention and financial commitment has been devoted by the federal government to the development by airport proprietors of broader and more comprehensive noise abatement plans. The increase in public concern about the airport noise problem now requires that affirmative federal action be taken beyond the evaluation of airport construction projects. Therefore, FAA is initiating a pilot project to encourage the preparation of comprehensive noise abatement plans by airport proprietors through the planning grant program of the Airport and Airway Development Act.

In formulating this policy to provide a financial incentive for airport noise abatement planning, FAA gave consideration to other alternatives including (1) requiring preparation of such plans by all airports certificated under section 612 of the Federal Aviation Act; (2) requiring the preparation of such plans by the busiest airports in the United States (for example, the top 100

airports by the number of operations); (3) requiring preparation of such plans as a prerequisite to imposition of an airport use restriction by FAA-certificated airports; (4) requiring preparation of such plans as a condition of awarding ADAP funds; and (5) encouraging preparation of such plans and review by FAA without providing federal financial support for this purpose. Although we are still open to further suggestions and comments, these proposals to make airport noise planning mandatory, or a condition of ADAP funding, or a prerequisite to the imposition of use restrictions by an airport proprietor were not adopted at this time because we have not had sufficient experience with this type of noise abatement planning by many airports that either may not have serious noise problems or may have already performed a comparable analysis*. Moreover, we strongly believe that airport proprietors have the incentives, the capacity, and the responsibility to undertake comprehensive noise abatement planning when it is needed, without detailed and duplicative federal oversight. We strongly urge them to do so. We will support them in this effort and provide technical and financial assistance where possible.

The FAA pilot comprehensive noise abatement planning program will have the following elements. Each year, to the extent that funds are available, FAA will award grants for not more than 25 plans on the basis of criteria including the quality of the proposal, the gravity of the noise problem afflicting the applicant airport and the likelihood that the development of such a plan will lead to the implementation of practicable noise abatement techniques of general value and applicability.

The objective of this policy is to promote a planning process through which the airport proprietor can examine and analyze the noise impact created by the operation of his airport as well as the costs and benefits associated with various selected alternative noise reduction techniques, individually and/or in combination. FAA personnel will support and cooperate with this effort through consideration of actions which they can take to reduce noise impacts.

Although FAA has not prescribed particular performance requirements for noise abatement plans funded under this program, the goal of the airport noise planning process should be to eliminate insofar as possible severe aircraft noise exposure and to reduce as much as possible significant aircraft noise exposure in communities adjacent to airports. The objective of airport noise

* In reaching this conclusion, the FAA considered public comments received in response to the July 9, 1975, notice (40 F.R. 28844) and testimony at public hearings held in 25 cities throughout the nation on Airport Noise Policy.

plans prepared under this policy should be to develop noise reduction techniques which, to the maximum extent feasible, confine severe aircraft noise exposure levels, levels of 40 NEF or more, to areas included within the airport's boundary. For areas adjacent to an airport exposed to significant aircraft noise levels of 30 NEF or more, the objective of the airport noise plan should be to develop noise reduction techniques that to the extent possible would confine the area exposed to this level of noise to the airport boundary or land actually being used or which can reasonably be expected to be used in a way compatible with these noise levels.

The Environmental Protection Agency was provided draft copies of this Policy Statement, and a number of informal discussions were held on the FAA's proposed airport policy as it was being developed. The EPA has advised FAA that it considers the FAA's policy a step forward in this area, although it believes further steps are necessary. On October 26, 1976, EPA proposed a regulation under section 611 of the Federal Aviation Act that would require all airports in the United States serving certificated air carriers to develop airport noise abatement plans by July 1979.. These plans, developed according to a common methodology and with extensive public participation, would be submitted to the FAA. Unless disapproved by the FAA, each plan would become a part of the airport's operating certificate issued under section 612 of the Act. The EPA proposal, like ours, has as its objective the bringing together of all interested parties with their respective authorities and obligations, thereby facilitating the creation of an agreed-upon abatement plan especially suited to the individual airport location. The EPA proposal has been sent to the Federal Register for publication, and will be the subject of public hearings on January 17 and 18, 1977. On the basis of these hearings and other analysis, the FAA will determine what revisions of the airport policy enunciated in this document are necessary, if any.

In developing an airport noise control plan, the airport proprietor may wish to consider the following categories of action:

a. Actions that the airport proprietor can implement directly:

(1) location of engine run-up areas;

(2) time when engine run-up for maintenance can be done;

(3) establishment of landing fees based on aircraft noise emission characteristics or time of day.

b. Actions that the airport proprietor can implement directly if he has authority, or propose to other appropriate local authorities:

(1) plan and control of land use adjacent to the airport by zoning or other appropriate land use controls, such as utility expenditures and the issuance of building permits;

(2) enact building codes which require housing and public buildings in the vicinity of airports to be appropriately insulated; and

(3) require appropriate notice of airport noise to the purchasers of real estate and prospective residents in areas near airports.

c. Actions that the airport proprietor can implement directly in conjunction with other appropriate local authorities and with financial assistance from the FAA, where appropriate:

(1) acquire land to insure its use for purposes compatible with airport operations;

(2) acquire interests in land, such as easements or air rights, to insure its use for purposes compatible with airport operations;

(3) acquire noise suppressing equipment, construction of physical barriers, and landscape for the purpose of reducing the impact of aircraft noise; and

(4) undertake airport development, such as new runways or extended runways, that would shift noise away from populated areas or reduce the noise impact over presently impacted areas.

d. Actions that the airport proprietor can propose to FAA for implementation at a specific airport as operational noise control procedures:

(1) a preferential runway use system;

(2) preferential approach and departure flight tracks;

(3) a priority runway use system;

(4) a rotational runway use system;

(5) flight operational procedures such as thrust reduction or maximum climb on takeoff;

(6) higher glide slope angles and glide slope intercept altitudes on approach; and

(7) displaced runway threshold.

e. Actions an airport proprietor can establish, after providing an opportunity to airport users, the general public and to FAA to review and advise:

(1) restrictions on the use of or operations at the airport in a particular time period or by aircraft type, such as:

(a) limiting the number of operations per day or year;

(b) prohibiting operations at certain hours - curfews;

(c) prohibiting operation by a particular type or class of aircraft; and

(2) any combination of the above.

f. Actions an airport proprietor can propose to an airline:

(1) Shifting operations to neighboring airports.

(2) Rescheduling of operations by aircraft type or time of day.

The existence, operation and development of an airport provides a service to and is interrelated with both the local community and airport users. These are also the parties who would be most directly affected by the airport operator's noise control plan. We therefore consider it vital that these parties have the opportunity to take part in the planning process. As a condition of FAA noise abatement planning grants, the airport proprietor will be required to provide for reasonable public notice of the plan and provide an opportunity for public participation in the development of the proposed plan. Public notice should describe the plan, the actions proposed, the reasons why these actions are proposed, alternative courses of action considered and why these alternatives were rejected. The FAA also encourages other means of involving the public, both formal and informal, to ensure meaningful public participation in the process.

The FAA will maintain communications with all airports involved in noise abatement planning -- whether or not FAA-funded -- and provide technical advice on the current state-of-the-art in airport noise reduction planning methods that have been successfully used throughout the country. This will include technical information regarding noise reduction and land use planning and guidance on procedures that airports may choose to consider in developing their plans. The FAA and other federal agencies, such as the Department of Housing and Urban Development and the Environmental Protection Agency, may suggest technical methodologies and criteria for land use compatibility that airports and affected local units of government may choose to utilize in their noise reduction planning. Federally funded model noise abatement plans will be monitored and evaluated. Information about successful noise abatement techniques will be disseminated by the FAA to all interested airport proprietors. The FAA will evaluate the model noise abatement planning program as well as the EPA proposal of October 26, 1976, to the FAA and the public comments on it at the conclusion of twenty-four months in order to determine whether broader noise abatement planning requirements should be encouraged or required.

4. FAA Review of Proprietary Use Restrictions

While the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Because of the intricacy of those systems, use restrictions at a single airport could, under certain circumstances, cause wide-spread disruption throughout those systems. Pursuant to the general federal interest in the free flow of interstate and foreign commerce, the constitutional principle that states and local entities may not impose undue burdens even where Congress or federal agencies have not acted, and the specific FAA responsibility for regulating the air navigation system, the federal government has the obligation to assure that airport proprietor actions to meet local needs do not conflict with national and international purposes. The proprietor's obligations to refrain from imposing an undue burden on interstate or foreign commerce or discriminating unjustly, and to avoid potential conflicts with the FAA's control of airspace and air traffic, are not difficult to articulate as matters of principle but very difficult to apply to a given factual situtation.

As noted above in the discussion of FAA's program to fund airport noise abatement plans, airport proprietors may propose so-called "use restrictions" or "operating procedures" as the

solution to an aircraft noise problem. Operating procedures, by their very nature, require implementation by the FAA. Indeed, the FAA, on its own initiative, has investigated and applied a number of operating procedures aimed at noise abatement, and has several others under consideration. In the future, where an airport proprietor proposes operating procedures to the FAA as a means of achieving noise relief, the FAA will review them to determine if they may be implemented without creating a safety hazard or significantly affecting the effecient use and management of the navigable airspace. If they are acceptable, the FAA will adopt and take appropriate steps to implement them.

The decision to propose a use restriction rests initially with the airport proprietor. It is expected that airport proprietors will consult and review such proposals with all the air carriers, other airport users and the FAA before any use restrictions are established. Here it is the role of the FAA to review those use restriction proposals and provide advice to the airport proprietor on his proposed actions. By this advice, the FAA will attempt to ensure that uncoordinated and unilateral restrictions at various individual airports do not work separately or in combination to create an undue burden on interstate or foreign commerce, unjustly discriminate or conflict with FAA's statutory regulatory authority.

For these reasons, all airport proprietors serving scheduled air carriers should apprise the Federal Aviation Administrator of their proposal to impose an airport use restriction. Such notification should be made a reasonable time in advance of the date the restriction is to go into effect. In all cases, notification of a proprietary use restriction should occur after and be accompanied by a detailed description of the alternative noise reduction techniques the proprietor has considered and the reasons supporting the adoption of the restriction in question instead of any other alternatives. The FAA will review all such use limitations submitted, advise the airport proprietor if it believes the limitation in question is or is not unjustly discriminatory or detrimental to the national air transportation system.

This review procedure is vital to the maintenance of harmonious relations between airport operators, air carriers and the FAA. By giving the FAA timely notification of use restrictions, supported by a thorough analysis of the alternative courses that have been considered, airport proprietors can assure FAA support, which may be necessary to administer the restriction in question successfully and which will prove valuable in any litigation which may ensue. If litigation over use restrictions does occur, the FAA will in appropriate cases ask the Justice Department to intervene or file amicus curiae in support of use

restrictions it considers valid. On the other hand, an airport proprietor that imposes a use restriction without analyzing alternatives and consulting with FAA cannot expect FAA to provide expert advice or to support its policies. The FAA will not endorse any proposed use restriction that has not had prior review, including public and airport user review as well as FAA review, nor will it recognize as valid any such restrictions that as a result of FAA review are considered to be unjustly discriminatory or a significant disruption of the air transportation system of the United States. In the latter case, the United States may institute or support litigation challenging an unacceptable use restriction.

E. Private Sector Responsibility

Air Carriers are responsible for assuring that the required portion of their operating fleets meet Part 36 noise levels within the time period required by federal regulations. Within that period it is also the carriers' responsibility to assure that an efficient and effective noise reduction plan is established that covers the retirement or retrofit of aircraft not meeting Part 36 as well as the operation of those aircraft in a manner designed to minimize their impact on noise sensitive communities. To this end, air carriers should attempt to schedule the operations of noncomplying airplanes into airports that do not have noise problems.

Air carriers can enter into agreements with airport operators to minimize the impact of aircraft noise through limitations on aircraft us These agreements, in certain cases, will be subject to FAA review and advice. The carriers should also fly their airplanes on schedules utilizing appropriate noise abatement operating procedures designed to minimize noise impacts.

Air travelers generally should bear the cost of noise reduction, consistent with sound economic principle and federal policy of internalizing the adverse environmental consequences in the price of a service or product.

Residents and prospective residents in areas surrounding airports should seek to understand the noise problem and what steps can reasonably be taken to minimize its effect on people. Recognizing that individual and community responses to aircraft noise differ substantially and that for some individuals, the reduced level of noise resulting from the implementation of this policy may not eliminate the annoyance or irritation. Prospective residents considering moving into airport and noise impacted areas should be aware of the effect of noise on their quality of life.

CONCLUSION

Aircraft noise abatement is a complex and controversial issue. In the wealth of information about the subject and midst the labyrinth of jurisdictional responsibilities, there are a few simple thoughts that should not be forgotten. In a society in which we are making rapid strides to improve the quality of life for all of our people, the continuing annoyance and irritation of excessive aircraft noise is an unwarranted intrusion upon the lives of some six million Americans. The federal government remains committed to taking all technologically feasible and economically reasonable actions to reduce excessive aircraft noise at its source and, working with airport proprietors, to reduce its impact on people.

It is clear, however, that the only successful attack that can be launched on this problem is one that involves the cooperative participation of all levels of government--state, federal and local--as well as airport operators, air carriers, aeronautical manufacturers, and airport neighbors. Only if each of these parties performs all the functions for which it is uniquely suited will we achieve significant and lasting progress in reducing both the number of people exposed to serious levels of aircraft noise and the severity of noise exposure for each and every American.

Although federal action to reduce the noise levels of operating aircraft has been long in coming, we hope that the time has enabled us to develop a policy which will work and will result in less noise exposure over the longer term as well as provide immediate relief. By the actions set forth in this policy, including those directed by the President, we are exercising those federal responsibilities that the Congress has required of us. We have set forth a federal action plan for the future so that other essential parties in the noise reduction effort can take complementary action and make their plans with a clear understanding of what the federal government has done and intends to do. Finally, we have set forth what we believe to be the responsibilities of other parties--airport operators, industry and local government-since the effectiveness of the federal action we take today is contingent on what these other parties do.

We thus invite these other parties to consult with us about their plans and proposals, to suggest innovative ways of meeting the noise problem in their communities, and to tell us how we can do our job more effectively. In turn, we will not hesitate to advise local governments and airport proprietors that they must exercise control over land use development and acquire additional land around airports to ensure that the national objective of confining severe aircraft noise to within the airport boundary is achieved. Nor will we hesitate to inform the air carriers and aeronautical manufacturers what this policy requires of them.

Working together, in the spirit of close cooperation and open communication, we will bring about quieter skies for all American citizens.

APPENDIX III

United States District Court

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1276

(MP)

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, *et al.*,

Defendants.

APPENDIX TO POST-ARGUMENT MEMORANDUM OF PORT AUTHORITY DEFENDANTS

PATRICK J. FALVEY,
General Counsel,
The Port Authority of New York
and New Jersey
One World Trade Center
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Attorney for Port Authority Defendants

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Appendix A

(Affidavit of Colonel William A. Gunter, Exhibit 4, in *Coxsey v. Hallaby*, 231 F. Supp. 978 (D. C. W. D. Okla., 1964))

AFFIDAVIT

STATE OF OKLAHOMA,
COUNTY OF OKLAHOMA, *ss.*

Comes now COLONEL WILLIAM A. GUNTER, a member of the United States Air Force, who, being first duly sworn according to law, deposes as follows:

1. I am a member of the military service, holding the rank of Colonel in the United States Air Force.

2. As part of my official responsibility as Director of Operations, Oklahoma City Air Defense Sector, 29th Air Division, Air Defense Command, United States Air Force, I have personal knowledge from official information on all supersonic flights over the Oklahoma City, Oklahoma, area on and after 3 February 1964, which have emanated from Tinker Air Force Base, Oklahoma.

3. As a result of my official duties, it is my personal knowledge that:

   a) All such supersonic flights were conducted pursuant to an agreement entered into by representatives of the Federal Aviation Agency and the Department of the Air Force and as directed by the first named agency;

   b) All such supersonic flights were flown by pilots in the military service of the United States Air Force;

   c) All of the military personnel participating in such supersonic flights or in the preparation for same were acting in each instance pursuant to directives of higher military authority;

Appendix A

d) None of the military personnel directly associated with such supersonic flights and named as defendants in the Order of the District Court of Oklahoma County, State of Oklahoma, attached hereto, participated in such flights or caused such supersonic flights to occur except upon military orders issued by higher military authority.

Further affiant sayeth not.

/s/ WILLIAM A. GUNTER
William A. Gunter
Colonel, USAF

Sworn and subscribed to before me this 15th day of May 1964.

My commission expires
9 Dec 1967.

/s/ ZONA HARRIS
Notary Public

EXHIBIT "4"

Appendix B

(Extracts from Affidavit of Gordon M. Bain, Exhibit 1, in *Coxsey* v. *Hallaby*, 231 F. Supp. 978 (D. C. W. D. Okla., 1964))

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, *ss.:*

GORDON M. BAIN, being duly sworn, deposes and states as follows:

As Deputy Administrator for Supersonic Transport, I am making this Affidavit on the basis of information obtained in the performance of my official duties and functions.

It is my intent in this Affidavit to set forth some of the background concerning the development of the supersonic commercial transport aircraft (hereinafter referred to as the SST), including the authority and need for the current sonic boom study being conducted at Oklahoma City.

The Congress of the United States appropriated to the Federal Aviation Agency $11,000,000 in its 1962 fiscal year appropriation (75 Stat. 347, Ex. B) and $20,000,000 in its 1963 fiscal year appropriation (76 Stat. 721, Ex. B) to undertake studies as to development of the SST. In a letter to each house of Congress, dated June 14, 1963 (Ex. B), the President announced this nation's "determination that the national interest requires" a national program to support the development of a United States SST. This letter stressed the importance to the nation of the development of the SST and proposed a program the cost of which could reach one billion dollars over about a six-year period. The President stated that ". . . the United States, through the Federal Aviation Agency, must proceed at once with a program of assistance to industry to develop an aircraft . . . ." (It is common knowledge that a commercial supersonic aircraft is currently being developed under joint British and French auspices and that the Russians

are in the initial design phase leading toward development of a supersonic transport.)

Pursuant to the President's letter and under the authority vested in the FAA Administrator by section 312(b) of the Federal Aviation Act of 1958 (49 USC 1353(b)) to undertake developmental work toward creation of improved aircraft, Congress appropriated $60 million to the FAA for fiscal year 1964 (77 Stat. 430, Ex. B) for furthering the SST development program into Phase II, which is a 12-month period required for detailed design of the SST. In the FAA justification submitted to Congress for these funds, there was recited required research in the SST "Operational Environment" to provide both the Government and industry "with data not now known and on which a successful development program must be based." Research on "Sonic Boom" was an item expressly recited therein as essential in assuring design criteria. (See p. 46, "Hearings on Independent Offices Appropriations for 1964 before a Subcommittee of the House Committee on Appropriations," 88th Congress, 1st Sess. Part 3. (1963), Ex. B)

• • •

In the FAA's August 15, 1963 "Request for Proposals for the Development of a Commercial Supersonic Transport," which governs the bids of interested manufacturers, the prescribed specifications concerning sonic boom overpressures were:

a. Maximum overpressure, during acceleration to supersonic cruise speeds, no greater than two pounds per square foot.

b. Maximum cruise and deceleration overpressures no greater than 1.5 pounds per square foot.

c. Sonic boom overpressure predictions shall be based on the latest techniques available from the Na-

> tional Aeronautics and Space Administration. Sonic boom overpressure calculations shall be based on a standard atmospheric condition, zero wind gradient, a reflective factor of 1.9 and the assumption that the aircraft is not engaged in a maneuver.

This in fact is a design limitation which has been placed upon the SST. Sonic boom overpressures of more than one and a half pounds per square foot when cruising and more than two pounds per square foot during acceleration to supersonic speed should not be exceeded by the SST.

The Federal Aviation Agency, together with other agencies in the Government who have done research work in connection with the sonic boom, believes that these overpressures will not cause integral structural damage.

• • •

It is clear that the Congress in its current fiscal year appropriation intended that the Federal Aviation Agency would conduct supersonic boom tests. (See "Hearings on Independent Offices Appropriations for 1964 before a Subcommittee of the House Committee on Appropriations," 88th Congress, 1st Sess. Part 3, pp. 30-39 (1963), Ex. B.)

• • •

FAA has rented four homes in Oklahoma City as part of its objective study. One of these homes which is directly under the flight path of the supersonic aircraft has $100,000 worth of test equipment installed for the purpose of determining if any structural change or structural damage will occur during the course of the study. At the end of 15 weeks no damage had been identified in this highly instrumented structure that can be definitely attributed to the sonic boom overpressures. In addition, three vehicles containing NASA instrumentation for collecting and recording overpressure data continuously moved to vari-

ous geographical locations throughout the study area. Arrangements are currently being completed for surveillance of six additional houses for continuous structural engineering survey to augment the structural reaction aspect of the program.

There has been no window breakage in any of the four houses. However, in order to determine at what point window breakage might occur in certain circumstances, windows in the test houses have been put under stress. The glass in some of the test houses has been etched with a diamond drill to weaken it. In some cases a BB shot was made through the center of glass windows, producing a hole. Observations will be made as to whether or not additional breakage occurs from the sonic boom overpressures. It is interesting to note that despite these changes, the test houses have not yet experienced any cracking or breaking of window glasses.

FAA has contracted with the Remmert Adjustment Company, an Oklahoma City firm, to investigate any allegation of damage or injury. This company had employed local qualified investigators and local state licensed engineers to investigate and review damage claims. As the Air Force has had extensive experience in evaluating sonic boom claims, FAA effected arrangements with the Air Force for evaluation and payment of valid claims by the Claims Officer at Tinker Air Force Base, with reimbursement by the FAA.

A continuous 26-week period was determined upon for the sonic boom study so as to include the three seasons of winter, spring, and summer and a wide gamut of changing meteorological conditions.

I have reviewed the information collated to date and, based on all known factors, believe that that program should continue as initially programmed. This conclusion is strongly supported by the absence of damages to FAA

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rented homes located under the flight path or in the sonic boom area of the supersonic flights, particularly the absence of damage to the building extensively calibrated for structural reaction effect.

The tests have not yet been of sufficient duration to permit collation of essential data. If we are now foreclosed by a Court Order from carrying on the study, a re-evaluation of the entire national SST program may be necessary.

/s/ GORDON M. BAIN
Gordon M. Bain

Subscribed and sworn to before
me this fifteenth day of May 1964.

/s/ ROSE A. CHACONAL
Notary Public
My commission expires Feb. 28, 1968.

EXHIBIT "1"

Appendix C

(Extracts from Affidavit of Major General Albert M. Kuhfeld, Exhibit 3, in *Coxsey* v. *Hallaby*, 231 F. Supp. 978 (D. C. W. D. Okla., 1964))

ALBERT M. KUHFELD, Major General, United States Air Force, Service Number 884A, The Judge Advocate General, United States Air Force, being first duly sworn, deposes and says:

THAT as The Judge Advocate General, United States Air Force, he is charged with certain duties and responsibilities as prescribed by United States statutes and the orders and directives of the President of the United States and the Secretary of the Air Force;

THAT among those duties and responsibilities he is charged with the administration, control, staff supervision, inspection, coordination, and monitoring of all activities throughout the United States Air Force pertaining to claims against the United States as well as the administrative settlement and payment of certain claims against the United States as authorized by Federal statutes;

THAT, pursuant to the Military Claims Act, 10 U.S.C. 2733, he is authorized to administratively settle and pay claims against the United States for damage to or loss of property when caused by the non-combat activities of the United States Air Force, including those damages and losses alleged to have resulted from the phenomenon of pressure waves which build up around aircraft flying faster than the speed of sound, which phenomenon is heard on the ground as a sharp noise and is commonly known as a sonic boom;

• • •

Appendix C

THAT as the result of the foregoing faster than sound flights essential to the national security of the United States, phenomena commonly known as sonic booms occur;

THAT people on the ground who hear such sonic booms allege damages to their property from such booms and thereafter file claims against the United States with the Air Force for such damages;

THAT, when shown to have been caused by sonic booms generated by United States Air Force aircraft, such damages are administratively payable out of the public monies appropriated for that purpose by the Congress of the United States;

THAT the proper administrative determination of the validity of such claims requires the investigation, review, and evaluation thereof;

THAT as a necessary element of the fair and equitable evaluation of such claims, it is essential to have available engineering analyses and criteria derived from current actual and practical tests and studies concerning the damage potential of such booms generated by some, if not all, of those aircraft presently in use;

THAT valid and proven analyses and criteria can be obtained only by actual tests of faster than sound aircraft operating in conjunction with engineering instruments properly calibrated to accurately measure the pressures generated by faster than sound flights under varied climatic and atmospheric conditions at pre-determined and known altitudes;

THAT the tests presently being conducted by the Federal Aviation Agency over and in the vicinity of Oklahoma

Appendix C

City, Oklahoma, can provide the needed engineering analyses and criteria indispensable to evaluation of the aforesaid claims, and there is no other present testing program which can provide the same information on an up-to-date basis.

/s/ ALBERT M. KUHFELD
ALBERT M. KUHFELD
Major General, United States Air Force
The Judge Advocate General
United States Air Force

SUBSCRIBED AND SWORN To before me in the County of Arlington, State of Virginia, this 28th day of February, 1964.

/s/ CAROLINE WIEWARA
CAROLINE WIEWARA
Notary Public, Arlington County, Virginia
My Commission Expires Oct. 23, 1965

EXHIBIT "3"

APPENDIX D

(Extracts From Press Conference With The Honorable William T. Coleman, Jr. Re Concorde Public Hearings)

Washington, D. C.
November 13, 1975

PROCEEDINGS

Mr. Greenwood: Good afternoon, ladies and gentlemen. First let me thank you for your interest and your attendance at this press conference. The principal topic of interest here today is the matter of the Concorde. Secretary Coleman has an opening statement he will make, and then he will handle any questions that you might have. May I present to you Secretary of Transportation William Coleman.

Secretary Coleman: Good morning—or good afternoon, ladies and gentlemen. As you know, British Airways and Air France have asked for permission to conduct commercial Concorde operations to and from the United States, and have stated that they intend to have six flights per day, four to land at Kennedy International Airport in New York, and two to land at Dulles International Airport just outside of Washington, D.C.

The Concorde is a supersonic aircraft, but the applicants have made it clear that all operations over the United States will be at subsonic speeds. The Federal Aviation Administration has advised me that Concorde operations will meet all appropriate safety requirements.

Since this is a major federal action, the FAA prepared and circulated a preliminary environmental impact statement. After public hearings another environmental impact statement is being issued today, which I'm pretty sure you have, which treats the environmental issues in a forthright

manner. Prior to making a decision I thought it would be in the public interest for me to outline the issues, as I see them, as raised by the environmental impact statement, along with the safety and international considerations and then have six hours of argument by those concerned so that these issues can be discussed publicly.

I am publishing an outline of the issues in the Federal Register, and I'm passing out to you, or I hope to by the end of this conference, a copy forthwith. It consists of 15 pages. As you will note, the date for the public argument will be on January 5, 1976, commencing at 9:30 a.m., and I will make a decision within 30 days thereafter. The Concorde presents new technology, and as in the case of any new technology, various environmental and other considerations must be taken into account. The FAA is establishing a special office to handle all public inquiries concerning the environmental impact statement.

As I said to you, I have prepared, and it will be made available to you, a document which consists of 15 pages. It is my attempt to outline every one of the issues as I see them raised. For example, in the environmental impact statement it's indicated that a small number of Concorde operations involved in the decision will increase in total noise exposure around Kennedy and Dulles will be limited. In addition, a turn soon after takeoff at JFK avoids a full impact of the noise, and as you know, the population is relatively sparse in the affected area at Dulles. It is a fact, however, that the individual noise events will disturb more airport neighbors than comparable range subsonic aircraft and will annoy those neighbors more because—and the environmental impact statement indicates four reasons why the noise level will be higher.

But I have to consider such facts that it's true, as you all know, that the Concorde is more noisy than the 747, but likewise the 747 is more noisy than the old four en-

gine prop job, and so one of the issues that I'll have to consider is whether, merely because of the noise, is that a basis to prevent new technology?

Another thing which is set forth in the environmental impact statement is that the limited number of operations to the United States may create an incidence of 200 new cases of nonfatal skin cancer in the United States each year. This has to be weighed in the fact that already each year there are 250,000 cases per year. In other words, the increase will be less than one tenth of one percent. This is because of the exposure in the atmosphere. In addition —and therefore, after that I list about 15 issues which I think are raised because of what's said in the environmental impact statement.

Then after that, there's always a question as to whether any environmental impact statement is complete. Therefore, I then indicate what the issues are with respect to that.

Then we next turn to the international and economic considerations, and we outline the fact that the British and French have spent in excess of $2 billion in development of this aircraft. We point out—we ask what would be the effect of an adverse decision, and to what extent should we consider that.

Then we go into the whole significance of techological progress, and once again we raise the issues under there, and I hope that you would take a look at that.

Then with respect to the safety factors, the FAA has indicated with respect to every safety factor that they feel the plane is safe, but the fact is there has been public debate. For example, whether the fuel reserve will be sufficient. With respect to that, the FAA has advised us the fuel reserve will be sufficient. Secondly, there's a question of the safety of the departure turn at JFK. As you know, there has to be a 25 degree bank soon after takeoff, and this is a maneuver that the FAA pilots have checked, and

also it's a maneuver that has been tested safely at Casablanca.

Then the next issue is exposure to cosmic radiation at high altitudes, and that issue is discussed.

Then there's been a lot of talk about the air traffic procedures, and the FAA has advised us with respect to that. And then there are other safety issues which I've outlined in this paper which I hope to deliver to you.

Finally, we raise a question of the various alternatives. As I said at the beginning, I feel that whenever public officials, particularly those that are not elected, have to make major decisions that there ought to be full opportunity for discussion. We do have the environmental impact statement. We have these other considerations, and I feel it's in the public interest to issue the environmental impact statement to indicate all of the issues that are troubling me, and then to ask that those parties that are interested will come in for six hours. I intend to divide it three hours for those in favor and three hours for those against, have a presentation, and then I hope that within —I know that within 30 days after that I will be able to make a final decision, and I think that, once again because reason ought to take—play a part in the decision, I hope to write—put my reasons in writing, so that then the Congress, the public, the British, the French, and everyone else involved in this issue at least can know the reason why I decided one way or the other.

At this time I will take any questions I can, and I hope this 15 page document gets down.

* * *

Press: Mr. Secretary, is one of the things you're going to be considering between now and January the possibility of allowing it in one airport but not in the other; say, allowing it at the federal facility at Dulles but not allowing it at the Port of New York facility at JFK?

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Secretary Coleman: Well, as you know, this problem really breaks down into two parts. Whenever anyone wants to fly an aircraft into this country, it has to be on the Operational Specifications. The FAA, a federal agency, has that authority. In addition, since the FAA and the federal government owns Dulles, a decision that you are going to amend the specification necessarily is a decision that it can land at Dulles. Now, when you get to the question of Kennedy, you have a different problem in that the convention under which we have relationships with the United States says that the airplane has a right to come into the United States, but that the local airport people have authority with respect to noise levels, and there is a question as to whether under the treaty just what would the people who control Kennedy do, and what under the law are they able to do. On the other hand, I am sure that the people at Kennedy are looking at the problem, and I guess only after I decide, if I do decide, that the specifications can be amended, or should be amended, in the way that the French and the British have requested, do we then get to the second question.

* * *

Press: Mr. Secretary, did you mean to be understood to say that you in certain circumstances wouldn't have the final authority on the New York ..... as well as the Dulles airport?

Secretary Coleman: Well, what I said was that once you decide that the specifications should be amended, you then are put back to the treaty, and we have read the treaty, and I'm pretty sure the British have, and we have to make a determination—first, obviously if we decide that the specifications should be amended, if we then decide that it should land at Dulles—none of which I've done yet—then at that point JFK would have to make a decision as the operator as to what it's going to do, and once it makes the decision,

and I hope it makes it with the same degree of care that I hope I make it with, then, assuming if they say that it can land, that ends the problem. If they say it cannot land, and if the French and the British for some reason don't accept that decision, then I'm pretty sure that there will be a reading of the treaties, and then we would have to determine under the treaties as to what the agreement and meaning was of those treaties.

Press: To answer my question, does that leave you with the final determination?

Secretary Coleman: No, sir. It leaves me the final determination if the treaties are read one way. If not, it doesn't leave me the final determination. There is a special provision in there with respect to noise standards which are nondiscriminatory, and I think that is one of the issues that I will have to address, but I first have to get over the initial hurdles as to what do I do as far as the request to amend the specifications.

Press: What have the New York authorities told you of their present attitude?

Secretary Coleman: To the best of my knowledge, they have not told me anything. I say to the best of my knowledge only for two reasons. I don't know whether there's some place in this Department a letter written by someone who represents to be from the New York Authority who made any statement one way or the other, and I guess from time to time I do meet people, and to the best of my knowledge I can't remember any discussion that I could say, you know, they said one way or the other.

Appendix E

(Extracts from News Conference with the Honorable Brock Adams, Secretary of Transportation, On the Draft Environmental Impact Statement (EIS) on the SST)

Washington, D. C.
April 15, 1977

PROCEEDINGS

Secretary Adams: We are responding as the Department of Transportation to an order of the District Court filed October 8th, 1976 requiring that we file a draft Environmental Impact Statement (inaudible). Suit was filed by (inaudible) which was required (inaudible) establishing a SST noise rule, and an Environmental Impact Statement is part of the noise rule process.

I was concerned with the filing of the statement today that it might be misunderstood as to what its purpose was. Why we were filing it, and what actions the Department was prepared to take and was taking because I know the matter of supersonic transports has been one of some controversy in both the United States and abroad.

What we have done with the Environmental Impact Statement and the reason for the limited number of copies is that it has been walked over to the Court today, and as you can see, it is a very thick document. This document is not a document that is necessarily the basis on which an SST noise rule will be issued, because it is in response to two things.

First, that there be a so-called best case and worst case outline of what might happen if Concordes or other SSTs such as the TU-144 were to fly into the United States. We have based it on Concorde data which we have, and it simply starts at one end, which would be if there were no operations the other end is if there were potentially 40 to 50 Concordes operating and they were to go into cities

where there had been established some potential that there might be a desirability of having service. This comes down to 12 cities in the statement, and from that comes an analysis of what would basically happen throughout the United States if this took place.

I want to emphasize this does not indicate that this is going to take place. There are actually only six Concordes in existence. But at the time the lawsuit was prepared, and at the time we were responding to the Court, we were required as an agency to take in to account the potential of what might be able to fly in and out of the United States.

We intend, moving forward from this point on, to complete the tests that are proceeding at Dulles. At that point we will be in a position to have factual actual flyaway data at that point which can be used as the basis for developing a notice of proposed rule making, and with that notice of proposed rule making a more sophisticated draft Environmental Impact Statement. In other words, that would try to narrow the choices.

But in the process of this draft, it will now be available for comment by the various people who may wish to comment on it, and we will use those comments in developing the notice of proposed rule making and the Environmental Impact Statement that could lead to the establishment of three items as are set forth in the statement and in the synopsis.

One, a noise rule generally. Second, if there is to become in the future some type of certification of the aircraft, it forms a basis for that. And third, as is pointed out in the draft Environmental Impact Statement, it can be used as a basis for operational specifications at individual airports.

That's what it is all about. I'd be happy to answer your questions on this or other matters on which you may have a question.

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Question: (inaudible).

Secretary Adams: May 24th is the date—is there—

Mr. : (inaudible).

Secretary Adams: —is the first year. I wanted to—be very careful with the dates. May 24th is the first year of flying, but then there are four months to analyze data after that has been completed. So, September is the time period that completes the potential time for analysis.

Question: Does that coincide with the expiration of the 16 month period, does it not?

Secretary Adams: That is correct. The 16-month period by the former Administration was based on a flying cycle on an entire year, and just a rather arbitrary selection of so many months to analyze the data.

Question: (inaudible).

Secretary Adams: Well, I have authorized on behalf of the Department that this take place. Whether or not it can or will be depends upon the New York Port Authority and their testing procedures of whether or not they believe it will meet the noise specifications of that particular airport. But as far as the Federal Government has been concerned, we have authorized it which means that, yes, we have taken the position that as far as our government is concerned it should have an opportunity to be tested. There's no other way we can determine the impact at that particular place in the United States.

Question: Mr. Secretary.

Secretary Adams: Yes.

Question: So far as you are concerned, the clock isn't running on New York yet.

Secretary Adams: No, the clock has not started to run. There have been no flights.

Question: Okay, and secondly, when the May 24th period comes up (inaudible).

Secretary Adams: Yes, they will.

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Question: (inaudible) our French and English allies, is there no way that the Federal Government can open up Kennedy to Concorde flights? Is there nothing at all you can do?

Secretary Adams: Not without changing the whole basic policy of approach that has occurred in the United States to this point, which is that we go with certification of aircraft and with noise rules, and the individual airports determine the so-called footprint or operating noise specifications of their individual fields. And so, we have been observing with our French and British friends precisely the rules we apply here.

Now, the missing piece that is involved that comes from this Environmental Impact Statement is there is no noise rule for subsonic supersonic flight—it's kind of a difficult one—subsonic supersonic flight in the United States. There's a statute that prohibits supersonic flight, but there has not been a noise rule established as there have been for all of our and other nations' presently existing subsonic planes, which is contained in Federal Air Regulation 36.

Question: Mr. Secretary.

Secretary Adams: Yes.

Question: (inaudible).

Secretary Adams: I can't give you the specific numbers in there. In the individual impact statements for each area you will find those contained in the charts in the back. I simply did not add them all up prior to coming to the briefing. We use it in a noise approach environmental impact statement, both an overall effect throughout the United States which I've included in my statement, then individual analyses of the selected 12 points which are contained in the charts in the back.

Question: Would you give us a definition of the difference between seriously impacted (inaudible) the way that it's been talked about.

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Secretary Adams: Seriously impacted is a definition that comes from the particular point in the so-called footprints around—and by footprint, it's just the outline of noise around the airport. The seriously impacted are those directly within the flight path which arrives at a particular perceived number of decibels, whereas the other classification is the shading out area which is another line along the footprint. And it is in direct proportion to what the ear perceives as the amount of noise from the pattern that exists.

Question: Mr. Secretary, would you consider the results of the draft EIS acceptable (inaudible).

Secretary Adams: No, I do not. That is why I indicated that we will have this available. We did this in response to the Court's order which was a best case-worse case proposition. But as we move to notice of proposed rule making, we will want to narrow to what we really believe will occur. And we will be prepared to hold public hearings in any place within these 12 where they request that they would like to have a service and want it examined.

For example, we have heard from the Dallas-Fort Worth area that they would like to have a service going into that point. So, if they would like to have a public hearing there, then appropriate officials in the Department will conduct that. But it cannot, in my opinion, establish a rule from simply a best case-worse case because the purpose of the rulemaking system is to give people who are either proponents or opponents a chance to comment in a narrow fashion.

The comments we will receive on this will enable us to narrow the notice of proposed rule making to what we really think will happen. I'll just give you one quick example of that. Since we know there are only 16 Concordes potentially in existence, we obviously are not looking at proposing a rule that deals with 40 to 50 which is

the worst possible case that was developed as this lawsuit was proceeding. Yes.

Question: (inaudible) take four months after this one year time period to analyze the data, does that mean that you are definitely absolutely going to have a noise rule by the time the 16 months are up?

Secretary Adams: No, it does not because we—

Question: What's going to happen to the (inaudible).

Secretary Adams: We will be analyzing the data. As you perhaps know, there are reports made monthly, published and available, of exactly what is happening. We will be analyzing those during the period of time after the year and up through the four month period. No decision has been made as to whether or not to continue it after that date or not continue it after that date, because we do no know whether we can get a rule out by the four month period.

We are constrained in that by the time periods required for publishing the either amended or new notice of proposed rule making, the time available for comment on that by both sides, and the time available for analysis of data, and then the drawing of the final rule.

Question: (inaudible).

Secretary Adams: No, I did not say that. I said that no decision has been made on that.

Question: (inaudible).

Secretary Adams: Yes, it would. The decision says periods which includes both periods, but it is not necessarily true. The way that it works is that once a noise rule, whatever it is, is proposed, and if it goes into effect, in other words it is not either stopped by Court action or Congressional action, that when that rule goes into effect it's just like when FAR 36 went into effect for subsonics on January 1, at that point if the plane meets it, it flies. If it doesn't meet it, it doesn't fly. Now, that's in terms of foreign flights.

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Now, with domestic flights there must be a certification of the airplane to fly domestically. And we have only now received the first request for a domestic flight, which is the so-called request by Braniff to do an interchange into Dallas-Fort Worth. That now triggers into effect the regular process within the Department of starting or not starting—because there's already been work done on it—of going through the certification process for a domestic flight. Because if you wish to fly from point to point within the United States, it must have a U. S. certificate. This airplane does not as yet have it, but we will start now to complete the process of determining whether or not it can be certificated.

That also is tied up in this statement because that requires a noise certification as well as whether or not it is safe to fly.

Question: Do you have a departmental deadline by which time you want a notice of proposed rule making issued?

Secretary Adams: No, I told them to do it correctly, to do it promptly, and to do it just like we do with the airplanes that are submitted from time to time to this Department. I want to be certain that our British and French friends are treated precisely and exactly the same as our domestic people are for certification of their plane. I think that fundamental fairness is involved, as well as treaty rights, and we will be as—we will proceed just like we would with our aircraft.

Question: Mr. Secretary (inaudible) has any American aircraft ever been denied certification (inaudible).

Secretary Adams: No, that I cannot answer. I will get that information for you, and if you want to ask our people, I will ask them to be available to you. The reason it's difficult for me to answer is that the noise rules begin to come into effect in 1960, and we've had relatively few new developments since then. But I cannot answer whether

or not one has been denied the right of certification in that period. But we will make it available for you.

Question: Mr. Secretary.

Secretary Adams: Yes.

Question: (inaudible). Are you—is the U. S. Government putting any pressure on the Port of New York Authority? Is there any pressure that you can put on? And also do you have any comment about the demonstration at Kennedy Airport the other night? Does that affect your thinking in any way about the Concorde?

Secretary Adams: I'll answer your questions one at a time. I have not put any pressure on the New York Port Authority. That is their decision. Now, whether or not somebody else in this very large government has or not, I do not know. I do not know if—of any pressure that has been placed upon them. I know that—well, I will say this. To the best of my knowledge, out of this department nobody has I know I haven't.

In answer to your second question, I think it's very unfortunate any time that we have demonstrations in the United States, and I am trying to do this in a very fair and orderly process of operating with this airplane as we do with domestic airplanes. And I know that this may repeat itself at various points throughout the country. This is why we have observed the general policy in the United States, as has been observed in Europe—many people are not aware of this—but as has been observed in Europe that individual communities have a degree of control over the environment around their airports.

For many years European countries, for example, established curfews and would not allow our planes to fly in during various hours of the night. That is just one example. We are still observing that policy.

Question: Well, isn't that a contradiction then if the communities around Kennedy (inaudible).

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Secretary Adams: Well, that decisions as far as I know has not been made in New York City, and when it is made then that will be the decision there. And the fact that people some for, some against, I find this is true in nearly every decision that I make in this department on any subject.

Question: Mr. Secretary, this draft statement says that even with the Concorde, aircraft noise will drop considerably around all these airports. Is that a significant factor leading you to say perhaps, well, yeah, let it come in because it's going to be quieter anyway?

Secretary Adams: Well, I don't want to take the second part and have you indicate that I have made up my mind one way or the other, because I have not. The statement does indicate something that I think that is important, which is we are reducing noise throughout the entire United States by requiring that all planes flying, foreign or domestic, on U. S. routes meet certain noise standards. And we have a program where these are being required to become less noisy, in other words, phasing out certain of our jets completely within an eight year period. So that the noise level throughout the United States is going down. This is the policy of the United States.

We will continue to enforce that and do it. Concorde is now a factor in that because of the request for route.

Question: Mr. Secretary.

Secretary Adams: Yes.

Question: If you don't know how long it's going to take to analyze the data from Dulles, and it may take longer than September, what stops you from saying whether or not the Concorde (inaudible) at Dulles. Why can't you say whether or not (inaudible) after September?

Secretary Adams: Well, I can when that time comes, but I'm not prepared to do it today.

Question: It that a decision that you have to (inaudible) with Mr. Carter about?

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Secretary Adams: Well, I think I would.

(Laughter)

Secretary Adams: I don't know If I'd have to or not. That's what bothered me about your question. I don't know if I'd have to or not, but I think I certainly would. It is a matter of major domestic importance in the United States, and as you are observing, it is a matter that involves also our relations with both the United Kingdom and France. And in decisions of those kind, I certainly have been observing, whether it's fishing rights or anything else, of consulting with the President and the other appropriate departments before making those decisions.

Question: Mr. Secretary, your predecessor's procedure for this whole Concorde thing allowed the Secretary of Transportation to stop the flights to Dulles at any time when he considered there was some serious reason to do that. Can we assume that (unintelligible) answer to the previous question you've decided you would not stop those flights if they continue as they're doing now indefinitely until you—until this—

Secretary Adams: I won't say—I won't say indefinitely because we have a definite period set for the trial, a 16 month period, and there must be a decision made at the end of that period. But I have no other information or knowledge at this point that would move me to require me to stop it prior to that period running. I think that answers the question that she had before on that. Yes.

Question: (inaudible)—can you clarify your feelings on surface transport regulations in view of Mr. Carter's statements that both you and he favor substantial deregulation of surface transportation.

Secretary Adams: We have not taken any position of moving forward on surface transportation at this point. We're working them one at a time, and there has been no decision made as to what will or will not be done with surface transportation regulation. We're working aviation

regulation now, and I hope we can complete that before turning attention as to whether or not we'll do the next one. Because that area that you are mentioning is an extremely large and complex one with many, many more units about which we have far less information than we do with aviation.

And I can see that we've got to do some things to move the aviation bill in the Congress at the present time, and our efforts will be devoted toward that. I've instructed staff here to make available both technical help and legal drafting help to whatever degree is requested or required by the Senate committee. And we are proceeding on that basis at this time.

Question: Mr. Secretary.

Secretary Adams: Yes.

Question: (inaudible) later this month on the Concorde, and if it's not postponed again—fifth or sixth time—will the Administration be going for it as a friend of the Court, based on the treaties and bilateral signed at the Chicago (inaudible) in 19—

Secretary Adams: We see no Chicago Convention issue at the present time, and we have no plans to enter into the Court suit.

Question: Has your Department analyzed the proposal made to the Port Authority by the British and French (inaduible) Concorde?

Secretary Adams: I'm sorry. I didn't get all that.

Question: I said has your Department analyzed the proposal made to the Port Authority on operation of Concorde in New York?

Secretary Adams: Yes, we have.

Question: And have you—

Secretary Adams: We have replied to their letter which they sent to us on a new operating procedure, and indicated that as well, the text of the letter really speaks for itself. It simply states that that operating procedure from

what we know of the airplane is technologically possible and safe in its operation, and that what they submitted it would say and do in terms of noise seems reasonable to us. We could not draw any further conclusions beyond that because we've never had a test flight there, so there's no way we have any empirical data.

What it really asked—what you're really asking about is whether or not we can draw a conclusion, and you can't draw a conclusion without any empirical data.

Question: What is the status of the airline talks with Great Britain and has the Concorde issue complicated that?

Secretary Adams: The Concorde issue has been placed in it. I don't know whether it complicates it any. We are in the position of having made an offer to the United Kingdom on both routes and capacity. They have not as yet accepted it. We hope they will. We hope they do, and I hope we'll be able to sign it before the 22nd of June when the time runs out. And we have, I think, a very skilled negotiator as you know. A number of us felt that there should be a change in the manner in which it was proceeding. We now have a single Ambassador speaking with a single voice. The United Kingdom is doing the same, and it's my impression that the negotiations are moving forward well. But we won't know the answer to that until we arrive at the middle of June.

Question: Is there any possibility that service between the United States and United Kingdom will be discontinued?

Secretary Adams: Yes, there's a possibility of that.

Question: How realistic is it?

Secretary Adams: Realistic.

Question: What do you perceive?

Secretary Adams: That it might happen. Okay. Thank you all very much. I enjoyed seeing you.

(End of proceedings as recorded.)

Appendix F

EXTRACTS FROM

U.S. DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

[EMBLEM]

DRAFT ENVIRONMENTAL IMPACT STATEMENT

NOISE REGULATION

AND

TYPE CERTIFICATION

ALTERNATIVES FOR

CIVIL SUPERSONIC AIRCRAFT

APRIL 1977

Distribution: W-1; RPL offices (100 each) minus Central and Rocky Mountain; ZEQ-428

Appendix F

Introduction

I. The FAA is considering the following actions directed at controlling the noise from civil supersonic aircraft:

1. Promulgation of a noise type certification regulation applicable to current and/or future design SSTs.
2. Promulgation of operating regulations applicable to current and/or future SSTs.
3. Type certification of the Concorde SST to permit U.S. air carriers to own and/or operate Concorde aircraft.
4. Amendment of air carrier operations specification to permit SST aircraft operations into U.S. airports.
5. Promulgation of airport specific noise regulations.
6. No action.

This draft environmental impact statement (DEIS) is prepared pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969. This assessment considers the probable environmental impact of unlimited operations of first-generation SSTs (Concorde) at 12 major U.S. airports selected on the basis of their ability to support relatively high-cost supersonic air travel and offer suitable routes to world business centers (Category I). For comparison, this DEIS also presents the probable impacts at these same airports if no first-generation SSTs are allowed to operate there (Category III). A set of alternatives with an intermediate level of impact (Category II) is also presented. The projected environmental impact is within the extremes quantitatively assessed in Category I and Category III. These options are examined in the next section. The 12 airports used in the analyses presented

here do not imply that Concorde flights at these locations are currently being considered, or may ever occur. Further, the projected levels of operations are based on unconstrained production of Concorde SSTs, estimated not to exceed 40 aircraft. These airports are presented solely to represent the potential "worst case" impacts from potential Concorde flights, and are not intended to imply that such flights should or will take place.

The noise analysis in this DEIS utilizes both single event and cumulative noises methodologies. The single event contours are presented in Section VI. Cumulative noise contours are available for inspection at FAA Headquarters in Washington, D.C., and FAA Regional Planning Offices. Copies have also been furnished to the airport authorities of the airports examined herein. Representative contours (reduced size) are presented with this volume.

The environmental impact of Concorde service into Dulles International Airport (IAD) and John F. Kennedy International Airport (JFK) was addressed in the FAA's Environmental Impact Statement for Concorde Supersonic Transport Aircraft and has been monitored at IAD since the initiation of service in May 1976.

The Union of Soviet Socialist Republics (U.S.S.R.) has not requested permission to operate its civil supersonic transport aircraft, the TU-144, into and out of the United States nor has it requested a U.S. type certificate. Therefore, there is no decision facing the FAA with regard to the TU-144. However, any regulation applicable to the Concorde would also apply to the TU-144.

The FAA received an application for a U.S. type certificate for the Concorde (Appendix C) from British Aircraft Corporation and Sud-Aviation on July 15, 1965. The airworthiness study and work related to a U.S. type certificate was begun but subsequently put in abeyance, since no U.S. air carriers indicated intentions to purchase and/or operate the Concorde. In order for a U.S. air carrier to operate

the Concorde, a U.S. type certification is required. Braniff International has requested permission to operate the Concorde between Washington, D.C., and Dallas/Fort Worth, Texas. In response, the FAA expects to proceed with the technical and administrative actions required to reach a decision on that request.

Two earlier Federal actions which have to some extent mitigated the SST's potential environmental impact are the "Civil Aircraft Sonic Boom," rule and the "SST Engine Emissions Standards." The Sonic Boom Rule, Federal Aviation Regulations (FAR) Part 91.55, requires any civil SST to fly at subsonic speeds over the United States, thereby eliminating most civic sonic booms in areas within the jurisdiction of this Government. Secondly, the Environmental Protection Agency (EPA) has set emission standards applicable to SST engines produced after January 1, 1981, and to SST engines certificated after January 1, 1984. The FAA considers that additional regulatory action is necessary to provide specific guidance for future SST development and to limit the noise impact of both current and future production models.

Section 611(c)(1) of the Federal Aviation Act, 49 U.S.C. 1431(c)(1) provides that the Environmental Protection Agency (EPA) shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic booms as EPA determines is necessary to protect the public health and welfare. That section also provides that the FAA "shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking." In accordance with the above, EPA has submitted two proposals concerning noise of civil SST aircraft. These were published as Notices of Proposed Rulemaking (NPRM), NPRM 75-15, "Aircraft Noise Requirements:

Civil Supersonic Airplanes," 40 F.R. 14093, and NPRM 76-1, "Airplane Noise Requirements for Operation to or from an Airport within the U.S.", 41 F.R. 6270. Public hearings were held on these notices. The hearings solicited public views on the advisability of promulgating noise rules and if issued, the noise levels that should be prescribed. Copies of the verbatim transcripts and the written comments given at those hearings and the written comments received are on file in the FAA's Office of Environmental Quality, 800 Independence Avenue, S.W., Room 838, Washington, D.C. 20591. In addition, the EPA has submitted a proposal on airport noise regulation which could also impose limitations on SST noise or operations (NPRM 76-24, Airport Noise Regulatory Process, 41 F.R. 51522). Copies of the above listed NPRMs are also available to the public. It is the intention of the FAA to hold a public hearing on the issues raised by this DEIS for consideration in the development of a final EIS and final rules. The time and place of that hearing will be announced.

II. *ALTERNATIVES*

The following discussion sets forth alternatives that the FAA is considering. The alternatives are considered in categories of environmental impact ranging from worst case environmental impact (Category I) to no environmental impact (Category III). In each of the three categories, several alternatives are discussed which would result in the identified category of environmental impact. The alternatives considered encompass all of the options submitted to the FAA by the EPA and published in NPRMs 75-15 and 76-1. All of the alternatives considered below assume that the sonic boom rule will not be waived and that no first generation SST operations will take place between 10 p.m. and 7 a.m. local time at each airport. They are described in general terms rather than in terms of specific regulations.

Appendix F

Category I: Worst Case Impact

Alternative 1. Issue Concorde Type Certificate without establishing applicable noise limits.

A U.S. type certificate will enable U.S. operators to operate Concorde. The worst case environmental impact as set out in Section V of this document might be realized should 30 to 40 Concordes be built, unless additional operating rules or restrictions other than those described above are applied.

Alternative 2. Require those SSTs with flight time after some future date to comply with FAR 36 (1969).[1] No restrictions would be placed on those SSTs with flight time prior to the designated date. Newly manufactured SST aircraft would be required to comply with FAR 36 (1969) after the selected date. Thus, future design SST noise levels would be limited to FAR 36 (1969) levels. The number of first generation SSTs allowed to operate in the United States would be limited depending on the date selected.

Newly certificated SST noise levels could be higher than those of newly certificated subsonic aircraft. This type of regulation would not control the noise levels of current design SSTs operated prior to the date selected.

Alternative 3. Require SSTs to comply with the same noise regulations applicable to subsonic aircraft at the

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[1] Federal Aviation Regulation Part 36 (FAR 36 (1969)) effective December 1969 set noise certification standards for subsonic transport category aircraft and subsonic turbojet powered aircraft regardless of category. Effective December 1, 1973, these standards were extended to most newly produced aircraft regardless of date of original type certification. Effective January 1, 1977, a phased compliance schedule was issued requiring all civil subsonic aircraft to meet these noise standards by 1985. On March 3, 1977, the noise limits were made more stringent for type certifications of new design aircraft (FAR 36 (1977)).

time of application for type certification; i.e., FAR Part 36 (1977) and possible future revisions thereto.

All newly certificated aircraft types would be required to comply with the same noise standards. Future SSTs would not exceed the noise standards applicable to subsonic aircraft.

But this type of regulation would not control the noise levels of current design SSTs. Such an approach could also effectively delay the introduction of second generation SSTs since the technology to achieve noise levels as low as can be achieved by subsonic aircraft has not been demonstrated.

Alternative 4. Issue no noise regulations applicable to current or future SSTs.

This is a theoretical alternative only and is included to illustrated the range of potential impacts.

A noise rule provides guidance towards the technological development of future SSTs. Without a noise rule there would be no safeguard against environmental degradation.

CATEGORY II—Intermediate Impact

Alternative 1. Allow limited or unlimited SST operations at FAA designated airports where carriers seek permission to operate. This alternative would restrict operation of first generation SSTs to airports where Federal authorities determine that the environmental impact is minimal. The availability of airports that might be suitable to receive SST operations has not been adequately determined. From an environmental standpoint, designated airports should have non-noise sensitive areas under the runway flight paths, and also be located near larger cities that would have sufficient travel demand for SST service. Federal decisions on local issues might be construed as discriminatory or arbitrary by some SST operators or by airport neighbors.

Appendix F

Alternative 2. Prevent U.S. operators from operating any SST not meeting FAR 36 (1969) or FAR 36 (1977) and prevent foreign operators from operating any future type of SST which does not comply with FAR 36 (1969) or FAR 36 (1977).

An SST regulation to limit noise from future design SSTs to FAR 36 (1969) or FAR 36 (1977) would prevent growth of noise around impacted airports, and would limit the operation of first generation SSTs (which appear unable to meet these noise levels) into the United States to foreign operators, thereby precluding its operation either subsonically or supersonically by U.S. carriers.

Allowing foreign carriers to operate SSTs into U.S. airports and restricting U.S. carriers from such operation may be discriminatory, and could be perceived as protectionism by the Concorde's manufacturers.

Alternative 3. Increasingly stringent restrictions on noise levels of successive production SSTs: e.g., noise limits at current levels for the first 16 Concordes and a phased reduction in noise levels to Part 36 (1969 or 1977) for various current SST airplanes manufactured after the initial 16.

If the conservative views regarding the economics of operation of the current SSTs prove correct and no more than 16 such airplanes are placed into service, such a rule would have no impact on the manufacturers or the environment. If, on the other hand, the current SSTs turn out to be economically successful, a series of increasingly stringent restrictions on the noise output of these airplanes would help to limit the overall environmental impact. In the light of present knowledge of supersonic aircraft noise control, it appears unlikely that significant reduction of the noise emissions of current SSTs could be accomplished without extensive and expensive redesign. Consequently, this type of rule would effectively impose a limit of 16 on

the number of first generation SSTs produced for service to the United States.

The introduction of the first production run of Concorde aircraft (16) without restriction would impose increased noise on the environment, although the increase would be limited. If additional first generation SSTs were placed into service, there would be additional increases in environmental noise beyond that which would occur with new subsonic airplanes, which must conform to Part 36 (1969 or 1977, as applicable) noise level requirements.

CATEGORY III—Baseline—No first generation SSTs.

Alternative 1. Prohibit all civil SST operations in the United States.

This is the simpliest and most effective method of eliminating the adverse noise effects of the SST. The rule would provide notice to prospective manufacturers and operators of SSTs that their airplanes would not be acceptable in the United States, but would be considered arbitrary or discriminatory in view of the fact that certain current subsonic aircraft do not meet the noise limits of FAR 36 (1969). It would also preclude SSTs from non-noise-sensitive airports that might desire such service.

Alternative 2. Prohibit all civil SST aircraft that exceed FAR 36 (1969) noise levels.

Requiring SSTs to conform to FAR 36 (1969) levels would protect the environment against SST noise to the same extent that FAR 36 (1969) does against subsonic aircraft noise and is consistent with the recently established rule requiring all subsonic aircraft operating in domestic U.S. service to meet FAR 36 (1969) standards by 1985. Because there is no known technology that would enable first generation SSTs to meet FAR 36 (1969) levels, this alternative is tantamount to an outright prohibition of

Concorde operations. In the FAA's best judgment, it would permit future types of SSTs.

Alternative 3. Prohibit all civil SST aircraft that exceed FAR 36 (1977) noise levels.

Under this alternative, the addition of SST operations would have no greater noise impact than the addition of new technology subsonic aircraft.

Since it is not technologically practicable for the first generation SSTs to meet FAR 36 (1969), meeting FAR 36 (1977) would be even more difficult.

Alternative 4. Allow operations of civil SSTs at any airport at which the associated increased noise impact is at least offset by concurrent reductions in operations of subsonic aircraft.

This alternative insures that SSTs do not increase the cumulative noise impact at airports, although this may serve to concentrate the noise impact to fewer, noisier events.

A particular carrier may not have sufficient operations of subsonic aircraft to allow such a trade-off and it would be patently unfair to force other carriers to curtail operations to maintain baseline noise contours. Further, it is not the function of the FAA to determine the level of service provided by a particular carrier to a particular airport.

III. *Design Characteristics of Supersonic Aircraft*

A. *General*

Air flowing past a body at any speed produces drag as a result of the friction between the air and the body surface. This is known as skin friction drag. Further friction or form drag results from the disturbance of the air flow caused by the passage of the body through the air mass. The form drag is related to the size of the body passing

through the air mass in terms of its diameter-to-length ratio. At subsonic speeds, the form drag increases slightly as the ratio increases. At supersonic speeds, however, the magnitude of the form drag increases substantially as the size or cross-sectional area of the body increases. This is also known as supersonic wave drag.

The slender design of supersonic aircraft that minimizes drag is a reflection of these aerodynamic considerations. Slenderness in design is applicable not only to the airframe but also to the power plant installation, nacelles, air intake system and wing span. The relatively small, cambered, delta wing of the Concorde and TU-144 represents an aerodynamic tradeoff of a number of factors. These factors are structural in terms of total aircraft weight, slenderness or form drag, and both thrust and lift. All of these factors are so closely interrelated that a change in any one area affects all other areas as well as total aircraft performance.

The major factor concerning noise from supersonic aircraft is their propulsion systems. The engine designs incorporate tradeoffs related to thrust requirements, supersonic aerodynamics (i.e., form drag or the slenderness concept), performance efficiency and range considerations. In order to operate at supersonic speed, the power plant design must combine a minimum-drag slender nacelle and an engine capable of producing a sufficiently high jet velocity to provide the necessary propulsion.

These requirements preclude the use of high-bypass ratio turbofan engines such as those used on subsonic aircraft because they do not provide the jet velocity necessary for propulsion at supersonic speed and their dimensions in terms of cross-sectional area would be inconsistent with the slenderness concept necessary to supersonic aerodynamics. The use of low-bypass ratio turbofan engines produces similar performance penalties in terms of range al-

though the penalties decrease as the bypass ratio decreases. Additionally, the use of turbofan engines with a higher bypass ratio would increase the weight of the current design SSTs. Assuming a constant range requirement, one consequence of increased aircraft weight is an increase in engine thrust or power. This increase in thrust produces an increase in both noise and emissions.

Part 36 noise standards were originally adopted in 1969. The noise level limits were chosen as representative of subsonic aircraft using medium to high by-pass ratio engines. These limits can be met in lower by-pass ratio engines by the use of Sound Absorbent Material (SAM) to treat the nacelles. For the reasons mentioned above, current technology SSTs are unable to use either method for lowering noise. Different and more innovative designs would have to be developed if the future design SSTs are to comply with the noise regulations.

Future supersonic airplanes must meet flexible performance requirements and maintain environmental acceptability. These, in turn, create major problems for the propulsion system which must accommodate two distinct modes of operation: (1) a high airflow, low jet-velocity turbofan-like mode for low noise takeoff and/or efficient subsonic cruise; and (2) a turbojet-like high jet-velocity, lower airflow mode for supersonic cruise.

The environmental requirements of future supersonic engines accommodating two distinct modes of operation have led to the technological innovation called multi- or variable-cycle engines (VCE). The variable cycle engine concepts with their characteristic inverted exhaust velocity profiles show an inherent noise attenuation in small-scale static tests. However, an ideal bypass ratio for subsonic operation of about five or six would be inappropriate for the inverted exhaust concept. Other design characteristics would reduce performance at supersonic cruise. A com-

promise bypass ratio (in the 0.5 to 1.5 range depending on the subsonic/supersonic mission mix) may therefore be chosen, which is not optimum for either requirement. The rationale for the VCE, then, is this potential ability to provide a better performance match at the various operating conditions while also satisfying environmental constraints.

B. *Noise Technology*

Insight into the noise characteristics of the Concorde is important as the basis for understanding its environmental impacts. The basic designs of the airframe and engine of the current production Concordes were established in 1965. The design objective was a supersonic transport aircraft with transatlantic range capability. A number of jet noise reduction methodologies were studied and those that did not incur substantial performance penalties were incorporated. Silencers in the jet exhaust system similar to those developed for subsonic jet aircraft have not been incorporated because they would adversely affect performance capability. The use of fixed silencers would result in a payload loss of 30 percent or a range reduction of 10 percent as a result of increased aircraft weight. If today's subsonic jet silencing technology could be applied to Concorde, the result would be an increase of some 60 to 70 percent in the direct operating cost due to increased specific fuel consumption, thrust losses and weight penalties. To offset these weight penalties, the aircraft would require additional thrust with concomitant increases in noise and emissions. As a consequence, the application of today's subsonic jet silencing technology to Concorde is not economically praticable. The variable cycle engine (VCE) concept may include the flow path of a duct burning turbofan and incorporate a unique main combustor power schedule utilizing extensive rotor speed control, variable geom-

etry in the fan, compressor, primary nozzle and secondary nozzle all of which result in control of the bypass ratio. For takeoff, the primary burner may be throttled and the duct burner provides the required thrust level. Additional energy supplied by the duct burner results in higher velocity in the outer annular stream permitting tailoring of the exhaust gas profile which maximizes the coannular noise reduction benefit.

Under subsonic cruise conditions the duct burner would be inoperative and the engine would operate as a conventional separate flow medium bypass turbofan engine. In this mode, additional energy by combustion would not be supplied to the bypass flow and the engine would provide relatively good subsonic cruise performance representative of turbofan engines.

During supersonic cruise operation, the compressor rotor speed and the temperature in the main combustor would be increased, and variable geometry features in the fan, compressor, and primary nozzle adjusted for maximum efficiency. Accordingly, the bypass ratio and the need for augmentation would decrease.

Additional energy provided by the duct burner could be minimized and the velocity and temperature tailored to closely match the primary stream resulting in specific fuel consumption approaching that of a well-designed turbojet engine. There are other concepts for dual-mode (subsonic/supersonic) engines that are under consideration for advanced supersonic aircraft. However, none of the dual-mode concepts has been reduced to practice.

C. *Air Pollutant Emissions Technology*

The power plant design of the current production SSTs incorporates modifications of engines utilized in the early 1960s. The Olympus two-spool axial flow turbojet engines which power the Concorde employ partial afterburning.

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The Kuznetsov engines used on the TU-144 are also partial afterburning systems. Engine design at the time, the mid-1960s, was not concerned with air pollutant emissions standards, and was only interested in meeting propulsion requirements.

Engines powering SST aircraft are required to incorporate design features which are necessitated by supersonic flight, but which are detrimental to the achievement of air pollution emissions as low as those from subsonic aircraft during ground operations and low speed flight in the vicinity of metropolitan airports. Unfortunately, these features important to achievement of good fuel consumption characteristics during supersonic cruise at high altitudes cannot readily be compromised. Such features include:

1. Use of afterburners by both current SSTs for thrust augmentation at takeoff, climb out and transonic acceleration and partial use of afterburners by the TU-144 during supersonic cruise.

2. Limitation to relatively low pressure ratios so as to avoid excessive compressor discharge temperatures during supersonic flight.

3. Use of pure turbojets or very low bypass ratio turbofan operating cycles so as to provide adequate thrust and fuel efficiency and to avoid the excessive weight and aerodynamic drag which would be caused by large diameter high bypass ratio engines, of the type which produce superior fuel consumption characteristics at subsonic flight speeds.

Because of these characteristics SST engine air pollutant emissions exceed those of engines used in subsonic aircraft (see Section V. B. 3).

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IV. *Operational Considerations*

A. *Departure*

Noise abatement takeoff procedures can reduce the noise impact of current supersonic aircraft. These procedures involve the application of full thrust plus afterburner to increase speed and gain altitude rapidly. Approximately 60 seconds after the start of takeoff roll, the afterburner is shut down and the power is reduced to establish a three percent climb gradient. A power cutback combined with preferential routing in terminal areas, can provide significant noise reduction in close-in noise sensitive communities. Since the location of communities around airports varies widely, the aircraft operators and the airport/air traffic authorities are in the best position to establish the most effective noise abatement departure procedures. Additionally, many airports have designated preferential runways which assist aircraft in avoiding noise-sensitive communities.

B. *Approach*

The noise analysis conducted herein utilizes a three-degree, stabilized approach. This approach profile is considered the standard operating procedure and is that required during FAR Part 36 noise certification. It is recognized, however, that the use of preferential routings and runways, and the "decelerating approach" technique can result in reduced noise levels in the descent areas and the runway approach zones.

C. *Air Traffic*

Since supersonic aircraft must be flown at subsonic speeds over the United States and its territorial waters (FAR Part 91.55), they do not require any unique air

traffic procedures during the approach, cruise, or departure phases of flight or on ground maneuvering. The subsonic cruising speeds are generally between MACH 0.90 to MACH 0.95. Optimum subsonic cruising levels are between 25,000 feet and 36,000 feet, and SSTs can operate within the dimensions and form of existing airways and other controlled airspace.

The SST's takeoff speed (170-210 knots) is higher than that of many subsonic jets; however, the ground roll is approximately the same. The maximum acceptable crosswind component for takeoff or landing is similar to that for subsonic jet aircraft; and the climb profile immediately after takeoff, although flown faster, is similar to that of a subsonic jet aircraft.

During a normal approach, SSTs are comparable to other heavy jet aircraft except that their speeds are higher. On intermediate approach, the speed of SSTs will be on the order of 230 knots which would be reduced to 200 knots at the start of final approach and reduced to 160 knots crossing the runway threshold. These speeds may be compared with those of large subsonic jet aircraft, viz., 200/180 knots on intermediate approach reducing to 150/140 knots on final approach crossing the runway threshold.

For virtually all air traffic considerations, such as holding patterns caused by traffic delays, landing and takeoff operations, and runway occupancy time, supersonic aircraft are either the same as subsonic jets or have no significant impact on the system.

It should be noted that implementation of FAA Order 7110.72 entitled "Local-Flow Traffic Management" issued November 15, 1976, further reduced noise from all turbojet powered airplanes operating in terminal areas. The air traffic procedures outlined in this Order require arrival holding to be accomplished at or above 20,000 feet. In addition, flying time below 10,000 feet above airport elevation will be reduced by (1) minimizing the use of speeds

of less than 210 knots, (2) eliminating holding or excess vectoring, and (3) designating the shortest practical route from the metering fix to the runway. On departures, routine altitude restrictions below 5,000 feet above ground level will be avoided.

V. *Probable Environmental Impact*

A. *Programatic Assumptions*

1. *Fleet Forecast*

This document considers the near term (1978) and longer term (1987) environmental impact of these proposed actions. There are two fundamental assumptions on which this analysis is based. First, it is assumed that the total first generation supersonic fleet will grow to the FAA forecast size of 30 to 40 aircraft. For the purposes of this analysis the higher figure of 40 aircraft is assumed. It should be noted, however, that only 9 of the first 16 Concorde production aircraft have been sold and that no further production beyond 16 is planned at this time. Consistent with this apparent curtailment of production it appears likely that the first generation of SSTs will have achieved its full size early in the next decade. Secondly, based on passenger traffic forecasts and the business/pleasure split of passenger travel, the maximum volume of possible Concorde operation for each of 12 selected U.S. gateway airports has been estimated.

As described in Section II, the various alternative actions have been condensed into three categories for assessing the environmental impact. The "worst case" situations, Category I, assume Concorde operations into the selected airports as required to meet the market demand for such service. With respect to noise, the impact is shown in the tables and figures as baseline plus Concorde for 1978 and 1987. The 1987 baseline calculations consider that all of

the older subsonic aircraft have been modified by the addition of sound absorbant material (SAM) or replaced by new aircraft. In any case, all will meet FAR 36 (1969) noise levels by 1987. Conversely, the baseline calculations for 1978 do not consider that a significant part of the fleet will have been modified to meet FAR 36 (1969) noise levels.

Category II alternatives are those which would have some impact but less than the "worst case." This category assumes restrictions on operations or numbers of aircraft produced. A limit on the number of aircraft produced, e.g. 16, would mitigate the overall impact primarily by a reduction of the number of cities served. However, it is anticipated that the operations forecast for each airport served would be as set forth in Section V.

Category III is comprised of those alternatives which would have no impact from first generation SSTs. This is the baseline case for 1978 and the baseline plus SAM for 1987.

This statement considers the impact of possible Concorde service into Anchorage, Boston, Dallas/Fort Worth, Honolulu, Los Angeles, Miami, Houston, Chicago, Seattle, and San Francisco, and, by reference, to the final Environmental Impact Statement(EIS) on Concorde, Washington (Dulles) and New York (Kennedy). In assessing the environmental impact of these 12 cities it is not intended to convey the impression that the operators of Concorde have sought the authority to serve all these cities or that other cities may not be served. Rather, this draft EIS conducts a "worst case analysis" for each of the 12 airports considered. Only Dulles is Federally operated and, therefore, only Federal approval is required for Concorde operations. The other airports are operated by local or regional authorities whose authorization must also be obtained for the Concorde to operate.

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The anticipated environmental impact of Concorde operations are calculated for 1978 and 1987. 1978 was selected as a year in which current aeronautical technology would be in use and a significant number of commercial supersonic aircraft could be in operation. Although the analyses were conducted on operations forecast for 1978 and 1987, it should be noted that the 1978 analyses are environmentally comparable to 1979 and the early 1980's while the 1987 analyses are comparable to the late eighties. 1987 was selected as a year in the longer term where present technology would probably still be employed and future technology could be in use as well, or at least in the developmental stage. Prediction of the environmental characteristics of aircraft beyond 1987 is tenuous due to the rapid rate of technological change in the aeronautical industry. The noise impact of the SSTs is presented relative to the cumulative noise from the fleet of aircraft serving each of the airports. While the total noise impact of the fleet incorporates the noise characteristics and frequency of operations of supersonic aircraft, it also accounts for the noise characteristics and frequency of operations of subsonic aircraft. Noise impact is also presented on a single-event basis. A Federal Aviation Regulation recently promulgated requires that subsonic aircraft powered by JT3D and JT8D engines be retrofitted or replaced by 1985. This regulation will bring the noise of individual subsonic aircraft in compliance with FAR 36 (1969) standards.

It must be emphasized that this analysis is based on FAA forecast traffic demands and does not suggest that the various airports examined have approved or will approve supersonic aircraft service. If other airports seek SST service, additional environmental assessments would be required. The estimates are:

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Year	*Airport — City*	*Frequency of Operation*
1978	Kennedy	8 per day
	Dulles	4 per day
	Anchorage	4 per day
1987	Kennedy	50 per day
	Dulles	10 per day
	Anchorage	8 per day
	Boston	4 per day
	Dallas-Fort Worth	8 per week
	Honolulu	4 per day
	Los Angeles	6 per day
	Miami	6 per day
	Houston	6 per week
	Chicago	6 per day
	Seattle	2 per day
	San Francisco	10 per day

Note that one flight consists of two operations, one landing and one takeoff. All operations are assumed to be between the hours of 7:00 am and 10:00 pm local time (i.e., no "night" operations), in accordance with the DOT decision and policy concerning Concorde operations at Dulles and Kennedy International Airports.

2. *Operational Assumptions*

Noise abatement departures will be used. A noise abatement departure consists of a power cutback or thrust reduction approximately 60 seconds after the start of the takeoff roll. At the time of power reduction, the Concorde would be at an altitude of approximately 500 feet above the ground. A three percent climb gradient would then be established. Subsequently, depending on local noise abatement and air traffic procedures, thrust would be in-

creased to climb power without the use of afterburner. The effect of these actions would be to mitigate the noise impact on communities located in the vicinity of the airports.

3. *Aircraft Noise Characteristics*

It is assumed that second generation SST aircraft will comply with the provisions of FAR Part 36 (1969). Thus the replacement of older subsonic aircraft by second generation SSTs will not increase the cumulative noise impact in the vicinity of airports until such time as new aircraft certificated under FAR 36 (1977) comprise a substantial portion of the U.S. air carrier fleet.

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D. *Noise Impact Analysis*

1. *Aircraft Noise Indices*

There are two basic techniques for quantifying the noise associated with aircraft operations. One method considers the cumulative noise generated by all aircraft over a 24 hour period, while the other quantifies the sound levels of a single aircraft measured at various points on the ground during the takeoff and landing. Both methods involve acoustical frequency and time dependent weightings on the basic sound pressure data.

A number of cumulative noise exposure techniques has been developed internationally. These include the British Noise and Number Index (NNI), the German Stoerindex (Q), the French Isosophic Index (N), the South African Noise Index (NI), and the International Civil Aviation Organization Weighted Equivalent Continuous Perceived Noise Level (WECPNL). Additional methodologies have been developed in the United States, including the Noise Exposure Forecast (NEF), Composite Noise Rating (CNR), Average Day/Night Sound Level (Ldn), and Air-

craft Sound Description System (ASDS). Each method includes several of the following factors: (1) an identification of single noise "events"; (2) an allowance for the intensity level and duration of each noise event; (3) an allowance for the number of noise events; (4) an allowance for the level of the background noise; (5) an allowance for variability of the intensity levels of the noise; and (6) an allowance for "other factors" such as time of day.

The other approach to quantifying aircraft noise involves simply stating the sound level at various locations on the ground during the operation of an individual aircraft. The sound levels used in this EIS are the "A" Weighted Sound Level in decibels (dBA) and the Effective Perceived Noise Level (EPNL) in decibels (EPNdB). One technique for presenting the sound level data for a given aircraft and operational mode involves construction of single event contours or footprints. All points on the ground along a contour will be exposed to maximum sound levels represented by the magnitude of the contour. Points outside the contour will be exposed to lower maximum sound levels while points within a contour will be exposed to higher maximum sound levels.

Noise data for a given aircraft can also be presented in terms of the sound level measured at selected locations on the ground. It is important to keep in mind the assumptions and limitations when comparing sound levels of different aircraft at any given point. The difference in sound levels between two aircraft under comparison will not usually be the same at different locations on the ground. This reflects the differences in their rates of climb, climb gradients, flight paths, thrust settings, and acoustical spectra.

One of the two techniques used in this analysis to represent noise exposure is the Noise Exposure Forecast

(NEF). The NEF analysis involves construction of contours which link together points of equal cumulative noise exposure. The contours are generated by a computer technique based on the following input data: airport flight patterns, number of daily aircraft operations by type of aircraft and time of day, noise characteristics of each aircraft in terms of EPNL during takeoff and landing and typical runway utilization patterns in terms of percentage of use. NEF contours have been constructed for the 12 airports addressed in this EIS for the various conditions described earlier.

There are equivalencies among the various cumulative noise indices. NEF is equivalent to Ldn minus 35, plus or minus 3. For example, Ldn 65 is approximately equal to NEF 30. A nonlinear relationship exists between NEF and CNR. The general equivalencies are shown below:

NEF 20 = CNR 85 = NNI 10 = Ldn 55
NEF 30 = CNR 100 = NNI 32 = Ldn 65
NEF 40 = CNR 115 = NNI 55 = Ldn 75

The second analytical technique used in this EIS is the single event noise contour or footprint. Effective Perceived Noise Level (EPNL) contours depict points of equal perceived noisiness expressed in units of EPNdB which are obtained by applying corrections for the presence of tones and duration to the Perceived Noise Level (PNL) in decibels (PNdB).

Much of the research in psychoacoustics has been undertaken using dBA, PNdB, and EPNdB. In evaluating jet aircraft noise equivalent values have been found relating dBA, PNdB, and EPNdB, e.g., jet noise expressed in EPNdB is roughly equal to dBA plus 13 (varies with distance and speed). Thus, the 100 EPNdB contour is about equal to the 87 dBA contour.

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Comparison of aircraft noise measurement data has shown that at slant ranges between 2,000 and 5,000 feet the EPNL will generally be from 0 to 4 dB higher than the maximum PNL.

2. *Existing Noise Standards*

The following discussion reviews various noise regulations as well as noise guidelines and recommendations. FAR Part 36 promulgated by the FAA in 1969 prescribes noise standards for the type certification of civil transport category aircraft and subsonic turbojet-powered airplanes regardless of category. In accordance with the Noise Control Act of 1972, the EPA forwarded two proposed rules to the FAA concerning supersonic aircraft noise control. Those proposals have been published by the FAA as Notices of Proposed Rulemaking (Appendix 3). No final action has, to date, been taken on these proposals.

As noted earlier, the operators of any aircraft must obtain whatever authorization is necessary from the airport operator prior to the initiation of service at that airport. Such authorization could depend, in some cases, on complying with noise limits specified by the airport operator. The Port Authority of New York and New Jersey which owns and operates JFK has established a 112 PNdB maximum noise level for aircraft on takeoff from JFK measured at specific points within adjacent communities. The Los Angeles Department of Airports, the operators of Los Angeles International Airport (LAX) has adopted a resolution which requires all air carriers to have their fleet serving LAX meet FAR Part 36 (1969) noise levels over a five year period. The relationship of the supersonic aircraft to these noise limits has been discussed previously.

APPENDIX G

FOR IMMEDIATE RELEASE MAY 2, 1977

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

EXTRACTS FROM
INTERVIEW WITH THE PRESIDENT
BY
DAVID DIMBLEBY, BBC-TC
CARL WEISS, ZDF
AND
EMMANUEL DE LA TAILLE, TFI

THE RESIDENCE LIBRARY

11:35 A.M. EDT

• • •

QUESTION: Mr. President, before we go farther, I feel obliged to ask you a question about the Concorde. You know that it has been loudly misinterpreted in Europe and the problem of Concorde is spreading anti-American feelings in Europe, especially in France, as you know.

What is your position on the political noise of Concorde and the way it could be solved?

THE PRESIDENT: My position is very clear. I support the decision made by President Ford and his Administration in authorizing a 16-month trial period for the Concorde, both at Dulles Airport, which the Federal Government controls, and also at the John F. Kennedy Airport, which is controlled by local authorities in New York.

As you know, where the Federal Government has had that authority, the test flights are now being conducted by Concorde at Dulles, near Washington. I have no authority at all over the New York Port officials—

Appendix G

QUESTION: The people in New York don't know that, are not familiar with that.

THE PRESIDENT: I know. That is the crux of the misunderstanding, because in our own Nation the Executive leaders, even the President, have absolutely no authority over the judicial system or the courts, and to try to exert that authority would be a very serious breach of our Constitutional processes.

We also have a similar Constitutional division of authority between local governments—that is, the State and the city on the one hand compared to the President. I have no authority at all to tell the Governor of New York State or the Mayor of New York City or the New York Port Authority what to do with the Concorde. We have made our Federal position clear, that we prefer to see John F. Kennedy Airport open to the Concorde for the 16-month period.

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APPENDIX H

(Extracts From a Transcript of April 22, 1977 Briefing on the U.S.-U.K. Air Negotiations)

Q. As long as you are standing, one last question for your, sir.

To what extent is the Concorde a troublesome issue of these negotiations?

Mr. Shovelton: I would say it is very troublesome.

Q. How so?

Mr. Shovelton: Well, I would note it stands to reason. I mean we, in our view, have a treaty, we have rights. We have rights to London-New York. We have rights to London-Washington. I doesn't delineate what type of aircraft should be employed. Our sole obligation is to comply with the laws and regulations of the country, out of the five a neutral agreement. We maintain that we are complying with the laws and regulations of the country. We accepted the Coleman inquiry which was a concession on our part under the terms of the neutral agreement, but we did that in a sense of willingness to play along with American procedures and the NEPA and so on.

The Coleman decision comes out sixteen months—twelve month trial period, four months for review. The Washington service started and then we find ourselves blocked on New York on the issue of pre-emption and the federal-state relationship in the past with local authority and we have tried through the U.S. Government and the French have tried, of course, with us very, very hard.

I mean this has been up to our Prime Minister's level and the French President's level with your President and we are in the unfortunate position of having no solution to this problem and we don't at New York and we don't look like we are getting a political solution and we are forced to go to court on the issue. We are going to court

on April 28th and we hope to resolve the matter in court. If we don't get a favorable decision in the court, well then we shall have to appeal. We will, in fact, go to the Supreme Court in the matter.

Washington is a different issue. I mean we are expecting because this is within the control of the federal authorities, we are expecting a decision from the federal authorities for the continuance of Washington at as early date as possible.

The French want to know where we stand on that. It clearly has a bearing on the agreement.

Q. Mr. Shovelton, one more please on the same subject. Please just one more.

There was a report in the London paper that you, I believe, personally contacted the State Department and you asked does the State Department in some manner the Concorde landing in New York and I am wondering whether or not you have had any reply from the State Department and, if so, what?

Ambassador Boyd: May I answer that?

Q. Sure.

Ambassador Boyd: The position the United States takes is that any aircraft operated by a party to the agreement should be permitted to fly to and from the United States so long as it complies with laws and regulations and the position the United States has taken is that the laws and regulations are both state and local and that it is a matter of domestic law and interpretation of domestic law as to whether the Port of New York Authority has, in fact, the power to issue noise regulations and to as a result of those noise regulations ban the use of any type of aircraft.

Q. Then what is the use of negotiating if the government is a local jurisdiction can practically—

Ambassador Boyd: That is the point the United Kingdom has been making, but the facts are that whatever the laws of any government may be the executive agreements that that country enters into is going to be subject to those laws.

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I shouldn't say "any country", but in the United States and we have made that clear all along.

International agreements do not in any way change our constitution. We don't amend our constitution by entering into treaties or executive bilateral agreements.

Q. Excuse me, Mr. Boyd. Maybe I misunderstood. But, did you say whether or not the State Department had, in fact, responded to the request?

Ambassador Boyd: I didn't, but I will answer you. The statement I made was a summary of the response of the State Department.

Q. Are you going to make any statement or deliver any letter to the April 28th court hearing?

Ambassador Boyd: No. I am not. I am not a party to the case.

Q. Is the United States Government?

Ambassador Boyd: I am not in a position to answer that, David. I don't know.

Q. Perhaps I could take it a stage further, Mr. Boyd.

If Judge Pellet (sic) requests an opinion from the State Department what will its Legal Advisor say?

I mean you have been, dare I say it, on the fence on this one, the same as other people in deciding what the constitutionality is.

If Judge Pellet (sic) asked you to stick your neck out, what is the State Department likely to tell him?

Ambassador Boyd: I cannot answer that. I do not speak for the State Department. That would be a matter which would be referred, I am sure, to the Legal Office of the State Department and I have no idea what the position would be and I have no authority to make any statement.

Q. Thank you.

Ambassador Boyd: Thank you very much.

Q. When do the next round of talks begin?

Ambassador Boyd: May 16th in London.

Mr. Brown: Thank you very much.

(At 11:50 the Special Briefing concluded.)

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